131-436

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 270.

THE FRANKFORT AND STATE LINE RAILROAD COMPANY, APPELLANT,

vs.

EDWARD F. LEONARD THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED MAY 17, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 270.

THE FRANKFORT AND STATE LINE RAILROAD COMPANY, APPELLANT,

vs.

EDWARD F. LEONARD THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Order consolidating causes	17	8
Order of reference	17	8
Answer of Frankfort and State Line R. R. Co.	18	8
Order as to evidence	27	22
Replication	28	23
Decree	29	23
Allowance of appeal	59	34
Appeal bond of Frankfort and State Line R. R. Co., filed	60	35
Master's report	61	35
Agreement as to evidence	64	36
Agreement of March 20, 1883	66	37
Schedule A—List of claims	74	40
Schedule B—Statement	76	41
Deposition of Wm. J. Craig	77	42
Exhibit A—Memorandum of agreement between Frankfort and State Line R. R. Co., & The Western Construction Co., Aug. 31, 1880	108	54
B—Articles of agreement between The Western Construction Co., and The Toledo, Cincinnati & St. Louis R. R. Co., June 9, 1881	115	57

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 14, 1888.

	Original.	Print.
Exhibit C—Memorandum of agreement between The Frankfort and State Line R. R. Co., and the Toledo, Cincinnati & St. Louis R. R. Co., —— —, 1882	127	61
Deposition of Wm. J. Craig (recalled)	129	62
Alfred A. Thomas	137	65
James H. Rice	161	75
Articles of association of The Toledo, Cincinnati & St. Louis R. R. Co	169	79
Memorandum of agreement between The Toledo, Cincinnati & St. Louis R. R. Co., of Indiana and Illinois, Oct 4, 1881	172	81
Clerk's certificate	192	89

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Walter Q. Gresham, judge of said circuit court, and the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

EDWARD F. LEONARD *v.* THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY, of Indiana and Illinois; The Toledo, Cincinnati & St. Louis Railroad Company, of Ohio, Indiana, and Illinois; The Central Trust Company of New York; Thomas A. Hendricks; The Frankfort & State Line Railroad Company, and Grenville D. Braman.	7814.	Chancery.

In the Matter of the FRANKFORT & STATE LINE RAILROAD COMPANY.

Be it remembered that heretofore, to wit, at the May term of said court, on the 16th day of June, 1884, before the Honorable
2 William A. Woods, judge as aforesaid of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by C. W. Fairbanks and Edward Daniels, his solicitors, and files his bill of complaint herein in the words following, to wit:

To the judges of the circuit court of the United States for the district of Indiana, sitting in equity:

Edward F. Leonard, a resident and citizen of the State of Illinois, brings this bill of complaint against The Toledo, Cincinnati & St. Louis Railroad Company, a corporation created by and existing under the laws of the States of Indiana and Illinois; The Toledo, Cincinnati & St. Louis Railroad Company, a corporation created by and existing under the laws of the States of Ohio, Indiana, and Illinois; The Central Trust Company of New York, a corporation created by and existing under the laws of the State of New York; Thomas A. Hendricks, a resident and citizen of the State of Indiana; The Frankfort & State Line Railroad Company, a corporation created by and existing under the laws of the State of Indiana, and Grenville D. Braman, a resident and citizen of the State of Massachusetts; and therefore your orator complains and says:

I.

That heretofore, to wit, on or about the 23d day of July, 1881, the

defendant, The Toledo, Cincinnati & St. Louis Railroad Company, a corporation created by and existing under the laws of the States of Indiana and Illinois, was the owner of and engaged in constructing and completing a line of railway from the city of Kokomo, Indiana, to the city of East St. Louis, Illinois; and on said last mentioned day, in pursuance of a resolution to that end duly adopted by the board of directors of said corporation, which resolution was thereafter, and before the execution of the bonds and indenture of mortgage hereinafter mentioned, duly ratified by the vote of holders of more than two-thirds in amount of the capital stock of said corporation, at a meeting duly called, and held on said 23d day of July, 1881, the said The Toledo, Cincinnati & St. Louis Railroad Company did execute, by its president and secretary, and under its corporate seal, its three thousand bonds for the sum of one thousand dollars each, dated on said 23d day of July, 1881, payable in gold coin of the United States on the 1st day of July, 1921, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each and every year, in gold coin, at the city of New York or in London, England, each of said bonds having interest warrants or coupons for thirty dollars each attached thereto for payment of interest as aforesaid; and said Toledo, Cincinnati & St. Louis Railroad Company issued and sold, or caused to be sold, a large number, to wit, two thousand eight hundred of said bonds, with said interest warrants or coupons attached, all of which bonds were, before the same were issued, duly

3 certified by the defendants, The Central Trust Company of New York and Thomas A. Hendricks, trustees; and said bonds are now in the hands of a large number of persons as owners and holders thereof, and with the proceeds of sale of said bonds the said Toledo, Cincinnati & St. Louis Railroad Company did locate, construct, and equip the line of railway hereinafter described, and did complete and improve the same.

Your orator further shows that, as he is informed and believes, a portion of said line of railway, extending from Kokomo to Frankfort, Indiana, formerly known as the Frankfort & Kokomo railroad, had been acquired by said Toledo, Cincinnati & St. Louis Railroad Company subject to the lien of a certain mortgage securing bonds of said Frankfort & Kokomo Railroad Company; that on said 23d day of July, 1881, there were outstanding two hundred of said last-mentioned bonds for the sum of $1,000 each, with accruing interest, all bearing date on the 1st day of January, 1879; that, pursuant to the terms of the deed of trust and mortgage hereinafter described, two hundred of the aforesaid bonds of the Toledo, Cincinnati & St. Louis Railroad Company, with coupons attached, were issued and delivered to the said The Central Trust Company of New York and Thomas A. Hendricks, trustees, to be retained by them and to be delivered, in such sums as might from time to time be required, at par value, to such persons as should present for exchange, at par value, said bonds of the Frankfort & Kokomo Railroad Company; that the said trustees have so delivered one hundred and twenty-four of said bonds of the Toledo, Cincinnati & St. Louis Rail-

road Company, all duly certified by said trustees, under the provisions of said mortgage hereinafter described, in exchange for one hundred and twenty-four of said bonds of said Frankfort & Kokomo Railroad Company, in accordance with the terms and provisions of the deed of trust and mortgage hereinafter described, and that the same, with coupons attached, are also in the hands of divers persons as owners and holders thereof.

II.

Your orator further shows that, in order to secure the payment of the principal and interest of said issue of bonds as the same should mature, the said Toledo, Cincinnati & St. Louis Railroad Company did, on or about said 23d day of July, 1881, in pursuance of the further provision of said resolution, execute and deliver to the defendants, The Central Trust Company of New York and Thomas A. Hendricks (hereinafter styled "the trustees"), a certain deed or indenture of trust and mortgage, which was duly recorded in the several counties in and through which the said railway was situated and extended, to wit, in the county of Howard, Indiana, on August 1, 1881; in the county of Clinton, Indiana, on August 2, 1881; in the counties of Tippecanoe, Montgomery, and Parke, Indiana, on August 3, 1881; in the counties of Fountain, Indiana, and Vermillion, Illinois, on August 4, 1881; in the counties of Vermillion, Indiana, and Edgar, Illinois, on August 5, 1881; in the county of Coles, Illinois, on August 6, 1881; in the counties of Douglas, Shelby, and Montgomery, Illinois, on August 8, 1881; in the county of Madison, Illinois, on August 9, 1881; in the county of St. Clair, Illinois, on August 10, 1881; in the counties of Fayette and Bond, Illinois, on August 11, 1881; and in the county of Cumberland, Illinois, on August 12, 1881, and thereby it did grant, bargain, sell, convey, and confirm unto the said trustees, their heirs and successor or successors, forever, in trust, all and singular the line of railroad of said To-
4 ledo, Cincinnati & St. Louis Railroad Company, as the same was then or should thereafter be constructed, between a connection with the Toledo, Delphos & Burlington railroad, in the city of Kokomo, Howard county, State of Indiana, and extending thence through the counties of Howard, Clinton, Tippecanoe, Montgomery, Fountain, Carke, and Vermillion, in the State of Indiana, and the counties of Vermillion, Edgar, Douglas, Coles, Cumberland, Shelby, LaFayette, Bond, Madison, and St. Clair, in the State of Illinois, to the city of East St. Louis, in St. Clair county, Illinois, being about two hundred and seventy miles in length, together with all and singular the right of way, road-bed made or to be made, its track laid or to be laid between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then owned or which should thereafter be acquired or then appertaining or which should thereafter appertain unto said described line of railroad between said points, together with all machinery, supplies, tools, and fixtures then or which should be at any time thereafter held, owned, or acquired by the said Toledo, Cincinnati & St. Louis

Railroad Company for use in connection with its line of railroad aforesaid between said points; and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights then or which should be thereafter owned by said last-mentioned railroad company in connection with its line of railroad aforesaid between said points, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenues to be received or derived therefrom, and conveying no other property; to have and to hold the said granted premises unto said trustees, their heirs and successor or successors, forever, in trust, nevertheless, and for the uses and purposes in said indenture expressed, which will more fully and at large appear by reference to the original thereof, and your orator craves leave to produce and refer to said original or to the record thereof on the hearing of this cause.

III.

Your orator further shows that in and by said deed of trust and mortgage it was, among other things, provided, and the said Toledo, Cincinnati & St. Louis Railroad Company did therein covenant and agree, that if the interest due on any of said bonds should not be paid by the said last mentioned railroad company when the same should become due, and should remain in arrears for six months after it had been actually demanded at the place where the same was payable, as specified in said coupons, or in case the principal of said bonds or any of them should not be paid at their maturity, then it should be lawful for the trustees or their successor or successors to forthwith demand, enter, take, and maintain possession of all and singular the railroad, premises, and franchises thereby conveyed, and as the attorney-in-fact or agent of said last mentioned railroad company, by themselves and agents or substitutes, duly constituted, have, use, manage, operate, and enjoy the same and each and every part thereof to as full an extent as the said railroad company might lawfully do; and should make from time to time all needful repairs, alterations, and additions thereto and receive all the tolls, income, and revenue thereof, and, after deducting the expense of such use, operation, reasonable repairs, alterations, and additions and the cost and charges of taking such possession, and a fair compensation for the services of such trustees for such taking possession and management while in possession, the said trustees or their successor for the time being should apply the remaining income and revenue arising from the use of said mortgaged property and coming to their hands to the payment of interest in default and maturing from time to time, satisfying the said coupons in the order of their several maturities, and thereafter apply the residue upon the principal of said then outstanding bonds.

And your orator further shows that it was also provided in said mortgage or deed of trust that if a six months' default should occur either in the payment of principal or interest of any of the bonds thereby secured after such actual demand as aforesaid, then it should be lawful for the said trustees or the trustee for the time being, with or without entry, as aforesaid, to cause all and singular the said

premises railway and appurtenances, equipment and franchises, thereby conveyed to be sold as an entirety, at public auction, to the highest and best bidder, at the city of Frankfort, Indiana, after giving at least sixty days' notice of the time, place, and terms of sale by advertisement in a newspaper of general circulation in the city of Frankfort and like advertisement in a newspaper of general circulation in the city of New York, and that on such sale said trustees or the trustees or trustee for the time being should make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof a good and sufficient deed in fee simple, conveying the said railroad property and franchises so sold, which conveyance should be a perpetual bar, both in law and equity, against said last-mentioned railroad company, its successors and assigns, and all persons claiming or to claim under them, of all right, title, interest, or claim of, in, or to the said premises and franchises or any part thereof; and that said trustees, after deducting from the proceeds of sale the costs and expenses thereof and a reasonable compensation to said trustees and their attorneys and agents for services in connection therewith, should apply so much of the proceeds as might be necessary to the ratable payment of principal and then the accrued interest of all the said bonds, whether the said principal should then be due or not; and if any proceeds of such sale should remain in their hands after the full payment of the principal and accrued interest of all said bonds, then they should render and pay over the same to said last-mentioned railroad company or its successors or assigns.

And your orator further shows that it was provided in said mortgage or deed of trust, and the said last-mentioned railroad company did therein and thereby expressly covenant and agree, that it would, in case of default in the payment by it, either of the principal or interest, of any of its bonds thereby secured, forthwith, upon demand of said trustees or of the trustees or trustee for the time being, surrender the full and peaceable possession of all and singular the premises thereby conveyed or intended to be, including all the real and personal property as was thereby mortgaged by it, acquired subsequent to the date of said mortgage for use in connection with the said line of railroad between said points, and also surrender all books of account, records, and papers used by it in and about the operation thereof.

IV.

Your orator further shows that at the time of the execution and delivery of the said mortgage or deed of trust the railroad of the said Toledo, Cincinnati & St. Louis Railroad Company extended and still extends through the county of Montgomery, in the
6 State of Illinois, in addition to the counties named in said mortgage, but that the name of the said county of Montgomery, Illinois, was inadvertently omitted from the description of said railroad contained in said mortgage or deed of trust; and that theretofore, and on or about the 17th day of August, 1881, the said Toledo, Cincinnati & St. Louis Railroad Company, in order to secure the payment of the principal and interest of the said issue of bonds, and

in order to correct the said error in the description of said railroad in said mortgage, made, executed, and delivered to said trustees a certain instrument in writing, bearing date on said last mentioned day, wherein and whereby the said railroad company did bargain, sell, convey, and confirm unto said trustees, their heirs, successor or successors and assigns, forever, in trust and for the uses and trusts created by said mortgage or deed of trust, all and singular that part of the railroad of the said Toledo, Cincinnati & St. Louis Railroad Company situated in and extending through the county of Montgomery, in the State of Illinois, together with all and singular the right of way, road-bed made or to be made, its track laid or to be laid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then owned or to be thereafter acquired by the party of the first part in connection with or then or thereafter appertaining unto that portion of its railroad lying in said county, together with all machinery, supplies, and fixtures then or at any time thereafter held, owned, or acquired by said party of the first part for use or — connection with the said part of its said railroad, with the depot grounds, yards, turnouts, sheds, machine shops then or thereafter owned by the said party of the first part in connection with the said portion of its railroad, together with all and singular the powers and franchises thereto belonging, and the receipts and revenues to be received or derived therefrom; to have and to hold said property, rights, franchises, easements, and premises hereby conveyed and intended to be conveyed unto said parties of the second part, their heirs, successor or successors, and assigns, in trust for the owners and holders of the said bonds issued and to be issued as aforesaid, upon the same and like conditions and with the same and like powers to those which are set forth in the said deed of trust or mortgage dated the 23d of July, 1881.

That said instrument called a supplemental mortgage was duly recorded in said county of Montgomery, Illinois, on the 13th day of October, 1881, and your orator craves leave to produce and refer to the original of said last-mentioned instrument on the hearing of this cause.

V.

Your orator shows that as to so much of said line of railroad as lies between the city of Frankfort, in the county of Clinton, State of Indiana, and the line dividing the States of Indiana and Illinois, extending southwestwardly from said city of Frankfort to a point on said State line near the town of Eugene, in the State of Illinois, being a distance of about sixty miles, the said mortgage hereinbefore first above described creates an equitable lien only, and is not a legal mortgage thereon; that the legal title to said sixty miles of road was, at the date of said mortgage and still is, vested in the Frankfort & State Line Railroad Company, which is a corporation created by and existing under the laws of the State of Indiana.

That before said sixty miles of railroad of said last-named
7 company or any part thereof was built, to wit, the 31st day

of August, 1880, said Frankfort & State Line Railroad Company and a certain company known as the Western Construction Company entered into a contract in writing, whereby, among other things, it was mutually agreed between them in substance and effect as follows, viz: That said construction company should build the railroad of said railroad company between the points aforesaid, being the sixty miles of road aforesaid, and that in consideration thereof said railroad company should make, execute, and deliver to said construction company its corporate bonds, secured by mortgage on its said line of railroad, to an amount equal to ten thousand dollars for each mile of road so to be constructed, said mortgage bonds to bear interest at the rate of seven per centum per annum and to be a first lien upon the railroad and other property of said railroad company, and also that it should deliver to said construction company paid-up certificates for all its said railroad company's capital stock, to wit, shares of — each, amounting in all at its par value to two million dollars, provided that said construction company should pay and deliver therefrom to third parties such portions or shares thereof as should be due to such third parties upon subscription or for tax or local aid.

That, pursuant to said agreement, said construction company built said line of railroad and received from said railroad company certificates for — paid-up shares of said capital stock, amounting at par value to eighteen hundred thousand dollars. The remaing two hundred thousand dollars of said capital stock was retained by said Frankfort & State Line Railroad Company, out of which to satisfy said claims of third parties for subscriptions or for tax or local aid. The exact amount necessary for such purpose is not known and cannot be ascertained until certain taxes or local aids are collected, but your orator is advised that the whole of said $200,000 of stock so retained will not be needed for that purpose, but that a considerable amount thereof will remain to be turned over pursuant to the terms of said agreement.

From the first and during all the time of the constructien of said sixty miles of railroad it was the purpose and intention of the promoters of said Frankfort & State Line Railroad Company and of said railroad company itself and all the parties interested therein that said sixty miles or thereabout of railroad should form a part of one continuous line of railroad extending from said city of Kokomo to said city of East St. Louis, and that said railroad company should become a constituent part of said Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois).

The bonds and mortgage provided for in said agreement were never, in fact, made or executed, nor did said construction company ever request or demand that the same should be made or executed. On the contrary, said Western Construction Company, having like contracts with said Toledo, Cincinnati & St. Louis Railroad Company for the construction of the other portions of said line from Kokomo to East St. Louis, procured said last-named company, with the acquiescence and consent of said Frankfort & State Line Railroad Company, to make the bonds and mortgage hereinabove first

described, and with like acquiescence and consent of said last-named company received an equivalent amount of the bonds herein first above described in lieu of the mortgage bonds of the Frankfort & State Line Railroad Company provided for in said agreement.

Said railroad of the Frankfort & State Line Railroad Com-
8 pany, to wit, the sixty miles of road above described, was, in fact, built and paid for in chief part with moneys derived by said construction company from the sale of the bonds so received by it in lieu of the bonds of said Frankfort & State Line Railroad Company provided for in said construction agreement.

From the time of the completion of said line of railroad extending from Frankfort to the Indiana and Illinois State line until the commencement of this suit said line had, in fact, been in the possession of the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois), and had been used by it as a part of its line from Kokomo to East St. Louis, with the full acquiescence and consent of the Frankfort & State Line Railroad Company, and since the bringing of this suit has been and still is in the possession of the court through its receiver, used and operated as a part of said continuous line.

In the construction of other portions of the line from Kokomo to East St. Louis the Western Construction Company became largely indebted to divers contractors, who claimed liens by reason thereof on said line of railroad, and, being unable to pay the same in money, the capital stock of the Frankfort & State Line Railroad Company received and to be received as aforesaid by the Western Construction Company was reserved by it as a fund out of which to accomplish payment of the debts owing to contractors.

Afterwards, on or about the twentieth day of March, 1883, an agreement was entered into between the Toledo, Cincinnati & St. Louis Railroad Company, of the first part; the Frankfort & State Line Railroad Company, of the second part; the Western Construction Company, of the third part; the American Loan and Trust Company of Boston, a corporation of Massachusetts, of the fourth part, and said contractors or certain of them, of the fifth part, whereby, after reciting, among other things, the facts aforesaid relating to said line of railroad from Frankfort to the State line, the manner and purpose of its construction, and the mode of paying for its construction, it was, among other things, agreed in substance as follows, viz: That said first party should assume said debts or certain specified portions thereof of said construction company to said contractors; that the second party, the Frankfort & State Line Railroad Company, should forthwith deliver to said construction company the remainder of its capital stock due for the construction of its road, to wit, stock amounting to $1,800,000, being the same $1,800,000 of stock above mentioned; that the third party, the Construction Company, should, and thereby did, deliver said capital stock to the fourth party, the American Loan and Trust Company, subject to the following trusts, viz: To hold as security for the payment of the debts assumed by the first party in certain specified installments, and upon such payment to be delivered over to a certain

third person for the use of the first party; but should default be made in the payment of any installment, that then all should become due, and the stock or so much of it as might be necessary should be sold for the payment of the same. Said second party also agreed to turn over to the Trust Company, the fourth party, subject to the same trust, all the remainder of said capital stock after satisfying the claims thereto of subscribers and on account of tax or local aids.

Your orator shows that said Toledo, Cincinnati & St. Louis Railroad Company, party of the first part to said agreement and defendant herein, made default in the payment of portions of said debts so assumed by it, and that thereupon, upon the demand of creditors interested, said American Loan and Trust Company ad-
9 vertised and was about to sell at public sale all of said capital stock or so much thereof as might be found necessary for the payment of said debts; that to prevent the sacrifice of said stock at such sale and to prevent the breaking of the continuity of said line of railroad from Kokomo to East St. Louis that might result from the passing of the capital stock of said Frankfort & State Line Railroad Company into other and perhaps adverse hands, the circuit court of the United States for the southern district of Illinois, upon the petition of William J. Craig, the receiver appointed in the suit pending in the said circuit court of the United States for the southern district of Illinois, hereinafter mentioned, filed therein on the — day of January, 1884, by its decretal order authorized and directed said receiver to make and execute receiver's certificates that should be a paramount lien on said line of railroad from Kokomo to East St. Louis wherewith to pay said debts, to secure which said capital stock was so held in trust.

It was further directed in said order that when said capital stock should be so redeemed it should be held by said receiver, subject to the order of the court, as further security for the payment of the receiver's certificates so to be issued, and after payment of said certificates to remain subject to the further order of the court as to its final disposition.

For greater particularity your orator prays that reference may be had to the record of said petition and said order of court as the same remain of record in said cause.

Your orator is advised that, pursuant to said order, the said receiver has executed receiver's certificates to an amount equal to the debts for which said capital stock was pledged in trust, and has effected an arrangement with said creditors by which they have accepted said receiver's certificates in satisfaction of their claims, and that all the certificates of said capital stock so pledged in trust, amounting at par value to $1,800,000, are now in the possession of the receiver, pursuant to said order.

VI.

Your orator further shows that after the execution of the mortgages hereinabove mentioned, to wit, on or about the 1st day of November, 1882, said defendant, The Toledo, Cincinnati & St. Louis

Railroad Company, contracted in writing with one Samuel C. Clubb, of the city of St. Louis, in the State of Missouri, for the purchase from him of a large and valuable parcel of land situated in the city of East St. Louis, in the county of St. Clair, in said State of Illinois, for its depot, yards, and other terminal uses. Said purchase was made at and for the sum of $21,217.30, of which sum said railroad company paid in cash down to said Clubb the sum of $8,205. The remainder of said purchase-money, to wit, $13,012.30, endorsed by the promissory notes of said company, was and is to be paid as follows, with interest at the rate of six per centum per annum, payable annually, viz., $5,204.92 on the 1st of November, 1884; $2,602.46 on the 1st of November, 1885; $2,602.46 on the 1st of November, 1886, and $2,602.46 on the 1st of November, 1887. Concurrently with the payment of said $8,205 and the execution of the notes said Samuel C. Clubb, together with his wife, executed and acknowledged a deed of conveyance in fee simple to said railroad company for said land. By agreement of parties said deed was delivered in escrow to one R. J. Lackland, of said city of St. Louis, to be by him held until full payment of the remainder of said purchase-money, and then to be delivered absolutely to said railroad company. Said deed is still held in escrow by said Lackland, and for a particular description of said land reference thereto is made. The interest on said deferred purchase-money up to November 1, 1883, has been fully paid.

On said 1st day of November, 1882, said Toledo, Cincinnati & St. Louis Railroad Company contracted in writing with the Wiggins Ferry Company, a corporation created and existing under the laws of the State of Missouri, having its principal office in said city of St. Louis, for the purchase from it of a certain other large and valuable parcel of land situate in said city of East St. Louis and in said county of St. Clair, Illinois; also for its depot, yards, and other terminal uses, together with a right of way for its railroad extending from said parcel of land eastwardly about — miles. Said purchase was made at and for the sum of $36,609.10, of which sum it paid in cash down $7,235. The remainder of said purchase-money, to wit, $29,374.10, evidenced by the promissory notes of said railroad company, was and is to be paid as follows, with interest at the rate of six per centum per annum, viz., $11,749.64 on the 1st day of November, 1884, and $5,874.82 on each of the first days of November of the years 1885, 1886, and 1887. Concurrently with the payment of said $7,235 and the execution of the notes said Wiggins Ferry Company executed and acknowledged a deed of conveyance in fee simple to said railroad company for said land and said right of way. By agreement of parties said deed was also delivered in escrow to said Lackland, to be by him held until full payment of the remainder of said purchase-money, and then to be delivered absolutely to said railroad company. Said last-named deed is still held in escrow by said Lackland, and for a particular description of said land and right of way reference thereto is made.

The interest on said deferred purchase-money up to November 1, 1883, has been fully paid.

Your orator shows that since the time of said purchases said Toledo, Cincinnati & St. Louis Railroad Company has been in continuous possession of said parcels of land and right of way, and that all the same are essential to the convenient operations of said railroad.

VII.

Your orator further shows that the said Toledo, Cincinnati & St. Louis Railroad Company has failed to pay the interest on said bonds, and has made default therein to all the holders thereof, and said company has failed to pay the interest warrants or coupons due thereon January 1, 1883, July 1, 1883, and January 1, 1884, and the same have ever since said dates, respectively, remained and still remain unpaid, although payment of the same was duly demanded, and that said default has continued and said interest has remained in arrears for more than six months, and many of the holders of said bonds to whom such default has been made, including your orator, have requested the said trustees to institute the necessary legal proceedings to foreclose said mortgage and sell the said mortgaged railway and property and for the appointment of a receiver of said property, and to take such other and further steps as may be necessary and proper for the protection of the rights of your orator and of the other holders of said bonds as said trustees are authorized to take by said deed of trust or mortgage.

Your orator further shows that, although said trustees have commenced their suit for the foreclosure of said mortgage in the circuit court of the United States for the southern district of Illinois,
11 and have herein procured the appointment of a receiver of said mortgaged property, yet said trustees have wholly failed and omitted to commence any such suit or proceeding within the State or district of Indiana, the said defendant, The Central Trust Company of New York, insisting that a suit for the purposes aforesaid should be commenced in the circuit court of the United States for the district of Indiana, and said defendant, Thomas A. Hendricks, insisting that such suit should be commenced in some court of the State of Indiana; and the said Central Trust Company of New York has refused to unite as complainant in any suit for such purpose in such State court, and said defendant Hendricks has refused to unite as complainant in any suit for such purpose in this court.

That your orator is the owner and holder of twenty-five bonds of the issue secured by said deed of trust and mortgage of the par value of twenty-five thousand dollars, and is advised and believes that the rights and interests of himself and of the other owners and holders of such bonds cannot be properly protected and enforced except by a suit in some court of competent jurisdiction within and for said State of Indiana or in some court of the United States having jurisdiction within and for the district of Indiana, and therefore your orator brings this bill on behalf of himself and of all other persons in like situation, owners and holders of the bonds secured by the mortgage aforesaid.

VIII.

Your orator further shows that the said Toledo, Cincinnati & St. Louis Railroad Company, proper corporate action for that purpose having first been had, did, on said 23d day of July, 1881, execute and deliver to said Central Trust Company of New York and Thomas A. Hendricks, as trustees, a certain other indenture of trust and mortgage, whereby it granted, bargained, sold, and conveyed unto said trustees all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill and the net income thereof to secure the payment at maturity of the principal of three thousand five hundred bonds of said Toledo, Cincinnati & St. Louis Railroad Company, known as income bonds, 2,500 thereof for $1,000 each, numbered consecutively from 1 to 2,500, both inclusive, and 1,000 thereof for $500 each, numbered from 1 to 1,000, both inclusive, payable on the 1st day of April, 1921, and of such interest upon the said bonds as might become due thereon, according to the terms of said bonds and of said indenture; that it was by said last-mentioned deed of trust and mortgage expressly provided and agreed that interest upon said income bonds was not to be due or payable except out of net earnings of said railroad company applicable to such purpose, and when the amount should have been ascertained and declared by the board of directors of said last-mentioned company, whose duty it was, by the terms of said indenture, in each year during the currency of said bonds, beginning with the year 1882, in the month of January, to declare what amount, if any, of net earnings had been made during the preceding fiscal year which was justly applicable to the payment of interest on said income bonds; and such ascertainment of net earnings was to be made by deducting from gross income all operating expenses, including rebates, taxes, insurance, rents, interest on floating and funded debt and borrowed money, and the payments made on the principal thereof, liabilities for interest on the existing first-mortgage bonds of the said railroad company, and other
12 payments, as by reference to said income mortgage will more fully and at large appear.

That the said last-mentioned mortgage was duly recorded in each of the counties in which the said first mortgage was recorded, so as to constitute a second lien or mortgage upon the railroad and property thereby conveyed.

Your orator further shows, on information and belief, that three thousand five hundred of said bonds so secured as aforesaid by said second or income mortgage have been issued and disposed of by said Toledo, Cincinnati & St. Louis Railroad Company and are now in the hands of divers persons as owners thereof, whose names are unknown to your orator.

Your orator further shows that no interest has become or is now due or payable on said income bonds under the terms thereof and of said second mortgage, owing to insufficiency of earnings, but that the principal of said income bonds issued as aforesaid is a lien upon said property, rights, franchises, etc., of said Toledo, Cincinnati &

St. Louis Railroad Company described in said mortgage next after the first mortgage hereinbefore described.

Your orator further shows that the same error existed in respect to said last-mentioned income mortgage, as hereinbefore stated, with respect to said first mortgage, in that the name of the county of Montgomery, Illinois, was inadvertently omitted from the description of said railroad contained in said income mortgage, and that on or about said 17th day of August, 1881, the said railroad company, in order to secure the payment of the principal and interest of the said issue of income bonds and in order to correct the error aforesaid, made, executed, and delivered to said trustees a certain other instrument in writing, bearing date on said last-mentioned day, conveying to said trustees, in trust for the purposes provided in and by said income mortgage, all and singular that part of the said railroad which is situated in and extends through the county of Montgomery, in the State of Illinois, together with its equipments and appendages and the net income thereof, all of which by reference to said last-mentioned instrument will more fully and at large appear.

IX.

Your orator further shows that in or about the month of February, 1882, the said corporation, known as the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois), a corporation of the said States of Indiana and Illinois, and a certain other corporation known as the Frankfort, St. Louis & Toledo Railroad Company, claiming to be a corporation of the State of Indiana, and a corporation known as the Toledo, Delphos & Burlington Railroad Company, organized under the laws of Ohio and Indiana, entered into an agreement with each other whereby said several corporations undertook, under the name of the Toledo, Cincinnati & St. Louis Railroad Company, to consolidate and unite all the lines of railroad of the Toledo, Delphos & Burlington Railroad Company with the lines of railroad of the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois), including said railroad mortgaged as aforesaid, and of the Frankfort, St. Louis & Toledo Railroad Company, at their respective points of connection, and to consolidate the capital stock of the said respective companies under the laws of Ohio, Indiana, and Illinois, and to transfer to and vest in said
13 consolidated company, under the name of the Toledo, Cincinnati & St. Louis Railroad Company, all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies parties to said agreement or consolidation, said consolidated company expressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby and assuming payment of the same.

And your orator further shows that the said company formed by said last mentioned consolidation, and known as the Toledo, Cincinnati & St. Louis Railroad Company, had or claimed to have the power to and did construct or maintain and operate a railroad from the city of Toledo, in the State of Ohio, to the town of Delphos, in

said State, and thence through the States of Indiana and Illinois into the city of East St. Louis, in Illinois, including the said railroad mortgaged as aforesaid, and from said town of Delphos to Dayton, Ohio; and also a railroad from Dayton to Wellston, Jackson county, Ohio, and thence to Gallipolis, Gallia county, Ohio, and a branch to a point at or near Ironton, Ohio; and also the railroad formerly of the Iron Railroad Company in Lawrence county, Ohio, with a branch extending from a point near Shakertown, Ohio, to a point at or near Lebanon, Ohio, to wit, Dodds, Warren county, Ohio, and a branch from Mercer to Shanesville, Ohio; and that on or about the 5th day of May, 1883, the said Toledo, Cincinnati & St. Louis Railroad Company entered into a further agreement of consolidation with two corporations, organized under the laws of the State of Ohio, known respectively as the Cincinnati Northern Railway Company and the Spring Grove, Avondale & Cincinnati Railway Company, the first-named company owning or being engaged in constructing a railroad from Cincinnati, Ohio, to Waynesville, Warren county, Ohio, and the second-named company being the owner of a line of railroad from a point in Cincinnati to Spring Grove Cemetery, Hamilton county, Ohio, which had theretofore been leased to said Cincinnati Northern Railway Company, whereby said three corporations undertook to consolidate and unite all their said lines of railroad and to consolidate the capital stock of the said respective companies under the laws of Ohio, and to transfer to and vest in the said new consolidated company, under the name of the Toledo, Cincinnati & St. Louis Railroad Company, all the powers, privileges, immunities, and property, real, personal and mixed, belonging to the respective companies parties to said agreement of consolidation, said consolidated company expressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby and assuming payment of the same, the capital stock of said new consolidated company to be thirty millions of dollars, of which eleven millions was to be preferred stock and the balance thereof to be common stock.

Your orator further shows that he is informed and believes that said several agreements of consolidation were acted upon by said companies from said respective dates, and that said consolidated company has failed to pay the bonds or coupons as to which default has been made as aforesaid or any thereof.

X.

Your orator further shows that it is claimed by the said last-mentioned consolidated company that it owns, by virtue of said last-mentioned consolidation, all the aforesaid property, rights, franchises, and assets of the said Toledo, Cincinnati & St. Louis Railroad Company, which executed the two several mortgages aforesaid, and that the same have become subject to the debts and liabilities of said consolidated company, but your orator says that whatever rights, if any, in or to the same the said last consolidated company acquired by virtue of said consolidation the

same are subject and subordinate to the several mortgages hereinbefore stated, and that the railroad, property, franchises, rights, and assets embraced in and covered by said mortgages are not, nor were they at the time of said last consolidation, of more than sufficient value to pay the amount of all the bonds and interest secured thereon by the several mortgages hereinbefore mentioned.

Your orator further shows that several of the constituent companies forming the said consolidated corporation known as the Toledo, Cincinnati & St. Louis Railroad Company heretofore executed various mortgages on the lines of railway and property owned by them, respectively, to the defendant, The Central Trust Company of New York, as trustee, which said mortgages cover in the aggregate, as your orator is informed and believes, substantially all of the property of said last consolidated company, known as the Toledo, Cincinnati & St. Louis Railroad Company; that default has been made in the payment of interest on all the bonds secured thereby, except income bonds, and that said mortgages are as follows:

1. First mortgage: Toledo, Delphos & Burlington Railroad Company to Central Trust Company, as trustee, dated January 17, 1880, to secure $1,250,000 of bonds, and covering the main line of said railroad from Toledo to Kokomo.

2. First mortgage (terminal trust): Toledo, Delphos & Burlington Railroad Company to Central Trust Company, as trustee, dated June 21, 1880, to secure $250,000 of bonds, and covering property in Toledo.

3. First mortgage: Toledo, Delphos & Burlington Railroad Company to Central Trust Company, as trustee, dated July 1, 1880, to secure $1,000,000 of bonds, and covering Dayton Division from Delphos to Dayton.

4. First mortgage: Toledo, Delphos & Burlington Railroad Company to Central Trust Company, as trustee, dated May 16, 1881, to secure $250,000 of bonds, and covering Cincinnati Division from Shakertown to Lebanon, Ohio.

5. First mortgage: Toledo, Delphos & Burlington Railroad Company to Central Trust Company, as trustee, dated May 16, 1881, to secure $2,250,000 of bonds, and covering Southeastern Division from Dayton to a point at or near Ironton.

6. First mortgage: Iron Railroad Company to Central Trust Company of New York, as trustee, dated August 1, 1881, to secure $500,000 of bonds, and covering lines in Lawrence county, Ohio.

7. First mortgage: Cincinnati Northern Railway Company to Central Trust Company, as trustee, dated October 1, 1880, to secure $1,000,000 of bonds, and covering line from Waynesville to Cincinnati.

8. First mortgage: Spring Grove, Avondale & Cincinnati Railway Company to Central Trust Company, as trustee, dated May 25, 1881, to secure $1,000,000 of bonds, and covering line from Cincinnati to Spring Grove cemetery.

9. The mortgage particularly described in the second paragraph of this bill.

15 Your orator further shows that there are also other mortgages held by the defendant, The Central Trust Company of New York, as trustee, and made by said several constituent railroad companies other than said Spring Grove, Avondale & Cincinnati Railway Company, to secure income bonds, which are junior to the several first mortgages hereinbefore recited and which are liens upon the aforesaid divisions, respectively, except that embraced in and covered by said terminal trust mortgage; that the said defendant, The Central Trust Company of New York, has commenced in courts of competent jurisdiction proper proceedings or suits in equity to foreclose the said several mortgage liens and to procure the appointment of a receiver of each of said separate lines covered by said respective mortgages, and that a receiver of said lines has been duly appointed by the several courts in which said suits are pending, and your orator is advised and believes that it will be for the interest of all the parties concerned that an order should be made by this court extending such receivership to this suit; that said Toledo, Cincinnati & St. Louis Railroad Company is hopelessly insolvent; that the defendant, Grenville D. Braman, has filed a bill in this court claiming to have some interest in the railroad and property hereinbefore described, and is for that reason joined as a defendant in this suit.

Wherefore, and forasmuch as your orator is remediless in the premises at and by the rules of the common law and can have relief only in a court of equity, to the end, therefore, that the said defendants herein may be required to make answer, respectively, to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were here repeated and they thereunto particularly interrogated, but not under oath, answers under oath being hereby expressly waived; that the said first mortgage may be adjudged and declared to be and to constitute a first lien upon the said line of railway of the Frankfort & State Line Railroad Company, and that the rights and interests of said trustees and of the holders of the bonds and coupons secured by said mortgage in and to the said last-mentioned line of railway and in and to the capital stock of said last-mentioned railway company may be ascertained, decreed, and determined; that the said mortgaged property, including said line of railway of the Frankfort & State Line Railroad Company and said capital stock and the rights and property described in the sixth paragraph of this bill, may be sold at a judicial sale thereof, free from the claims of all parties hereto or of all persons whose interests are in any manner represented by any party hereto, under the decree of this honorable court and upon such terms and conditions as to the court shall seem meet and proper; that each and all of said defendants and all persons in like situations with them or any of them, and all other persons claiming or to claim by, from, or under them or any of them may from and by said sale be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to any and all of the property mentioned and described in this bill; that an account may be had and taken of the bonds secured by the said several mortgages

of the said Toledo, Cincinnati & St. Louis Railroad Company, and of the amount due on said first-mortgage bonds for principal and interest, and of the amount due upon said income mortgage bonds; that out of the proceeds of such sale there may be paid the cost and expenses thereof and the amount of principal and interest due upon the said first-mortgage bonds and coupons;
16 that the balance, if any, of said proceeds of sale, to the amount of said second mortgage or income bonds may be paid to said trustees for the holders of bonds secured by said income mortgage, and that if such proceeds be insufficient for the purposes aforesaid that the said defendants, The Toledo, Cincinnati & St. Louis Railroad Company of Illinois and The Toledo, Cincinnati & St. Louis Railroad Company of Ohio, Indiana, and Illinois and each of them may be adjudged to be liable and may be required to pay to said trustees the amount of any deficiency which may remain after the application of said proceeds in the manner aforesaid; that pending this suit a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all and singular of the mortgaged property and premises, and the property, franchises, equitable interests, things in action, effects, moneys, receipts, bills, incomes, earnings, rights, privileges, and immunities of said company connected with or relating to said mortgaged premises, and of all the rolling stock, machinery, equipment, and other property incident to the same; that said several railroad corporations may be ordered and directed to transfer and deliver to said receiver all the property, real and personal, and all contracts, records, and papers, bills, books of account, deeds, evidences, and muniments of title of or pertaining to said railroad in their respective hands or possession, and that said receiver may be authorized and directed to maintain and operate said railroad and to keep the same in proper repair and to receive, collect, and preserve all the property, assets, and income mentioned or described and included in said first mortgage of said Toledo, Cincinnati & St. Louis Railroad Company, and that such other orders or directions may be made in respect to said receivership as may be equitable and proper; that an injunction may issue restraining the defendants and each of them from interfering with, transferring, selling, or disposing of any of the said mortgaged property, and from taking possession of, levying upon, or attempting to sell the same or any part thereof, and that your orator may have such other or further relief as the nature of the case may require and to your honors seem meet—

May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said defendants, The Toledo, Cincinnati & St. Louis Railroad Company of Illinois, The Toledo, Cincinnati & St. Louis Railroad Company (of Ohio, Indiana, and Illinois), The Central Trust Company of New York, Thomas A. Hendricks, The Frankfort & State Line Railroad Company, and Grenville D. Braman, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court and then and there

severally to answer all and singular the matters aforesaid (but not under oath), and to stand to, abide, and perform such other or further orders and decrees therein as to your honors shall seem meet.

EDWARD F. LEONARD,
By C. W. FAIRBANKS AND
EDWARD DANIELS,
His Solicitors.

17 And afterwards, to wit, at the May term of said court, on the 2d day of July, 1884, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

EDWARD F. LEONARD
v.
THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY *et al.* } No. 7814.

and

THE CENTRAL TRUST COMPANY OF NEW YORK
v.
THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY *et al.* } No. 7815.

Come now the complainants in the two above-entitled causes, by their respective solicitors, and by agreement it is hereby ordered that the said two causes be, and they hereby are, consolidated, and that they be carried on hereafter as one cause under the name and title of the cause first above mentioned.

And afterwards, to wit, at the May term of said court, on the 3d day of June, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

18 Come now the complainants, by counsel, and upon their motion it is ordered that the matters in controversy herein be, and the same are hereby, referred to William P. Fishback, Esq., master in chancery, to take the testimony thereon and report the same to this court, together with his conclusions of law thereon, with all convenient speed.

And afterwards, to wit, at the May term of said court, on the 23d day of June, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the Frankfort and State Line Railroad Company, by Harris and Calkins, its solicitors, and files its answer herein in the words following, to wit:

The said defendant, The Frankfort and State Line Railroad Company, reserving all manner of exceptions and objection to the many errors and insufficiencies in the bills of complaint and each of them

of the said complainants in the above-entitled consolidated causes, for answer thereunto, or to so much and such parts thereof as it is advised it is material for it to make answer unto, answering, says:

That the said defendant, The Frankfort and State Line Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and that it is the owner of a line of railroad beginning at the town of Frankfort, in
19 the county of Clinton, and running thence westerly to the State line dividing the States of Indiana and Illinois.

Said defendant further says that before and during the construction of the line of railway of said Frankfort and State Line Railroad Company from Frankfort, in Clinton county, Indiana, to the west line of the State of Indiana, in Vermillion county, the promoters of said railroad company secured a large amount of local aid by way of subscription and by way of tax voted by the townships, towns, and cities through which the said line passed.

That the defendant is informed and believes, and therefore states the fact to be, that the sum of about one hundred and seventy-five thousand dollars was thus raised for the purpose of building said line of railway, and that said sum was subscribed and voted as aforesaid upon condition and in consideration of stock of said company to the amount thereof being issued to the persons, townships, cities, and towns by which the same was so subscribed and voted, and it avers that said stock to said amount was accordingly so issued and is now outstanding.

Said defendant further avers that the sum of about twenty-five thousand dollars of its capital stock was given and issued to various persons in payment for the right of way of its railroad and for ties and other materials furnished in the construction of its railroad, all of which is now outstanding and which constitutes, together with the stock issued on account of local aid and subscription, about the sum of two hundred thousand dollars, which in and by the
20 contract in the bills of complaint mentioned between this defendant and the Western Construction Company was reserved and not turned over to said construction company.

That the residue of the capital stock of said company, to wit, $1,800,000, was issued and turned over by this defendant to the Western Construction Company on the completion of its railroad as and for a part payment of the construction of said road by said construction company.

And said defendant denies that it was ever in any way consolidated with or became a part of the Toledo, Cincinnati and St. Louis Railroad Company or any other company.

The defendant admits that it was agreed between it and said Western Construction Company that said construction company should receive all of the capital stock of said railroad company except the aforesaid two hundred thousand dollars thereof in consideration that such construction company would build its line of railroad between the points aforesaid.

Said defendant admits that it was the original understanding between it and the said Western Construction Company that the

said construction company should receive from it its bonds secured by mortgage on its line of road to the amount of $10,000 *dollars* per mile in part payment for the construction of its said railroad, but it says said bonds and mortgage were never made, executed, or delivered to the said Western Construction Company, nor was there any agreement ever made between this defendant and the said
21 Toledo, Cincinnati and St. Louis Railway Company whereby the bonds of said last-named company were to be issued and given to the said Western Construction Company in lieu and stead of the bonds by it agreed to be issued and delivered.

The defendant admits that, as matter of fact, it never did issue or deliver its bonds and mortgage to the Western Construction Company or to any other person or persons in pursuance of said understanding and agreement aforesaid; and the defendant says that of right it ought not to have issued the same, because the said Toledo, Cincinnati and St. Louis Railway Company received all of the aid voted and donated along said line, which amounted in the aggregate sum to two hundred thousand dollars; that said sum, together with the stock of this defendant used in manner as aforesaid to the aggregate amount of about two hundred thousand dollars, and the further sum of $1,800,000 of its capital stock so delivered to the said Western Construction Company as aforesaid, was sufficient and ample to build and construct said railroad between the points aforesaid; that there is now due and owing for the construction of said railroad about the sum of forty thousand dollars, which when paid will leave the road clear and free of debt.

This defendant admits that the said sum of $1,800,000 of the capital stock of said defendant agreed to be issued to the Western Construction Company was, at the time and under the contract in the bill of complaint mentioned, issued by said railroad
22 company and delivered to the Loan and Trust Company, as in the bill of complaint mentioned, subject to the trusts and for the benefit of said Toledo, Cincinnati and St. Louis Railway Company, for the benefit of the debts mentioned, and is now held subject to such trusts by the receiver in this action; but said defendant says that said $1,800,000 of capital stock aforesaid ought not to be held for the payment of the debts mentioned in the said bills of complaint for all the sums therein named, but only for about forty thousand dollars thereof, because it says the residue of said debts did not accrue upon or in the construction and building of its said railroad, but accrued and were made for the building of the railroads of other companies; and the defendant therefore says that said $1,800,000 of stock should be delivered to the said Western Construction Company or to its assigns whenever the said sum of forty thousand dollars is paid.

Said defendant shows to the court that it was the original intention of the promoters of the Frankfort and State Line Railroad Company to make it a constituent part of the continuous line of railway extending from Toledo, in the State of Ohio, to East St. Louis, in the State of Illinois, but it denies that it was the intention of the promoters and stockholders of its said railroad to consolidate its

property and franchises with other lines of railroad forming connection therewith or with said Toledo, Cincinnati and St. Louis Railway Company, but, on the contrary, in all the arrange-
23 ments and contracts made between said connecting roads any consolidation was expressly and purposely excluded therefrom, and the defendant never agreed or consented to any agreement or arrangement of or for consolidation whereby its property or franchises were in any way to be merged into any other corporation, or whereby its property became or was to become in any way mortgaged to secure the bonds or indebtedness of any other railroad company.

On the contrary, it avers the fact to be that it was the purpose and intention of the consolidated line known as the Toledo, Cincinnati and St. Louis Railway Company to make the line of the Frankfort and State Line Railroad Company a part of the continuous line of railroad operated by said first-named company between the points before mentioned by obtaining the control and ownership of the majority of its capital stock, or by such other means as might be mutually agreed upon. For that purpose the agreement in the bills of complaint whereby the stock of this defendant was turned over to the Loan and Trust Company for the benefit of the Toledo, Cincinnati and St. Louis Railway Company, as in the bills of complaint mentioned, was made and consum-ated, it being the object and purpose of said arrangement of said last-named company to get control of and use the defendants' line as a part of its continuous line without making any consolidation therewith.

And, to further consum-ate and carry out the purposes and
24 intentions last aforesaid, the defendant avers that it was agreed by and between it and the said Toledo, Cincinnati and St. Louis Railway Company that this defendant should lease its railroad to said last-named company for the term of — years at the nominal consideration and price of one dollar per year, and said lease was, in fact, prepared and drawn in writing but was never executed or delivered, but said last-named railroad company entered into possession of defendants' railroad with the distinct understanding that it was to lease its railroad and operate it as a leased line in connection with its other line of railroad between Toledo and East St. Louis.

The defendant further says that if said Toledo, Cincinnati and St. Louis Railway Company did not receive a sum sufficient from taxes and local aid and other donations along the line of defendants' railroad to fully construct and build the same that it may have advanced of its own moneys a sum sufficient to finish the construction and building of defendants' railroad, less the amount now owing, but did so without requiring or exacting any mortgage of this defendant to secure the money so advanced (if any was advanced) and relied solely upon the controlling interest which said company had arranged to acquire, and which it did afterwards attempt to acquire, by obtaining the ownership and control of the said $1,800,000 of stock, but whether said sum so advanced were the proceeds of its bonds or any of them secured by the mortgage in the bills of complaint mentioned, the defendant is not informed and therefore

25 does not admit, but it avers that the Toledo, Cincinnati and St. Louis Railway Company did not intend to include in said mortgage the property and franchises of this defendant, but, on the contrary, said property and franchises were purposely excluded from said mortgage, and the same was only intended to embrace the property and franchises of the Toledo, Cincinnati and St. Louis Railway Company.

And the defendant further shows to the court that the consolidated company known as the Toledo, Cincinnati and St. Louis Railway Company was made up and formed by the consolidation of various railroad companies forming connections between Toledo and East St. Louis aforesaid, among which was a separate railroad corporation known as the Toledo, Cincinnati and St. Louis Railroad Company, which said company was organized under the laws of this State for the purpose of building a railroad between Frankfort, in Clinton county aforesaid, westwardly to the State line between Illinois and Indiana on a parallel line with the line of defendant's railroad.

That said Toledo, Cincinnati and St. Louis Railroad Company never did any work in and about constructing its railroad, and existed wholly as a "paper line;" that when said defendant, Toledo, Cincinnati and St. Louis Railway Company, was formed by the consolidation of various connecting lines of railroad the said Toledo, Cincinnati and St. Louis Railroad Company was one of the connecting links in its consolidation, and served to make on paper a

26 through line and continuous franchise from Toledo to East St. Louis, and that said consolidated company known as the Toledo, Cincinnati and St. Louis Railway Company never purported or pretended to take in the railroad of this defendant as a constituent part of such consolidation, but the link between Frankfort and the State line aforesaid was supplied by consolidating with the "paper line" known as the Toledo, Cincinnati and St. Louis Railroad Company aforesaid, upon which the mortgage and bonds in this suit were executed; and defendant says the mortgage and bonds in suit were not imposed upon the property and road of this defendant; all of which facts the defendant is ready to verify.

Wherefore the defendant asks and prays that it may be dismissed hence without costs; and it will ever pray, &c.

JAS. H. RICE,
President of the F. & S. L. R. R. Co.

HARRIS & CALKINS,
Solicitors for said R'y Co.

27 And afterwards, to wit, at the May term of said court, on the 24th day of October, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now Harris & Calkins and Winters, solicitors for Frankfort and State Line Railroad Company, and Smith and Chapman and Col. A. W. Hendricks, solicitor for the Central Trust Company, trustee, and J. M. Butler, for J. M. Quigley *et al.*, bondholders' com-

mittee, and by consent it is ordered that the evidence in the matter of the issues joined upon the answers of said Chapman, Smith, and Frankfort and State Line Railroad Company to the bill of complaint in said causes 7814 and 7815, consolidated, be closed within six days from and after this 24th day of October, 1885; and by like consent it is further ordered that William P. Fishback, master, report to this court the evidence taken before him in said matter upon said issues, without reporting any findings or conclusions of law thereon, said evidence to be so reported to this court immediately after the closing of the taking of said evidence.

And afterwards, to wit, at the May term of said court, on the 2d day of November, 1885, before the Honorable William
28 A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

And at the same time come the complainants, by counsel, and file their replication to the answer of the Frankfort & State Line Railroad Company herein in the words following, to wit:

These repliants, reserving all advantage of exception, etc., for replication to said answer say they will aver and prove their said bills to be true and sufficient in law to be answered unto, and that the said answer of said defendant is untrue and insufficient to be replied unto, without this, that any other matter or thing in said answer contained material in law to be replied unto is true; all which matters these repliants are and will be ready to aver and prove, and they humbly pray as in and by their said bill they have already prayed.

BUTLER, STILLMAN & HUBBARD,
BAKER, HORD & HENDRICKS,
Sol's & Counsel for Central Trust Co.
C. W. FAIRBANKS,
E. DANIELS,
Sol's & Counsel for E. F. Leonard.

29 And afterwards, to wit, at the November term of said court, on the 12th day of November, A. D. 1885, before the Honorable Walter Q. Gresham and the Honorable William A. Woods, judges as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now The Central Trust Company of New York, by Butler, Stillman and Hubbard and Baker, Hord and Hendricks, its solicitors in this behalf, and said Edward T. Leonard, by C. W. Fairbanks and E. Daniels, his solicitors, and said James M. Quigley, Halsey J. Boardman, and Warren D. Hobbs (successor to Charles W. Pierce), by McDonald, Butler and Mason, their solicitors, and the Toledo, Cincinnati and St. Louis Railroad Company of Ohio, Indiana, and Illinois, and the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, by Henry D. Hyde, their solicitor, and the Frankfort and State Line Railroad Company, by Harris and Calkins, its solicitors, and John E. Smith and Elverton R. Chapman, by

Harris and Calkins and T. Winter, their solicitors, and The Farmers' Loan and Trust Company, by Turner, Lee and McClure,
30 its solicitors, and said Thomas A. Hendricks, in his own proper person; and said Grenville D. Braman, being three times audibly called, comes not, but herein makes default; and, it appearing that he had duly entered his appearance as defendant on August 13th, 1884, it is ordered and adjudged that the matters and things in the bill of complaint mentioned be as to him taken as true and confessed.

And this cause now coming on to be heard is set down for hearing and final decree upon said bills of complaint and the exhibits therewith filed and the answers of said defendants, respectively, and upon the evidence taken and reported to this court by the master, as also the original mortgages in the bill of complaint mentioned and the master's reports herein; and the court, having heard the same and the argument of counsel and being sufficiently advised, finds that all the material averments of said bills of complaint and said cross-bill of the Farmers' Loan and Trust Company are true, and that the equity of this cause is with said complainants.

First. And the court particularly finds from the pleadings, exhibits, and evidence aforesaid that heretofore, to wit, on and prior to the first day of January, 1879, there existed under the laws of the State of Indiana a corporation
31 known as the Frankfort and Kokomo Railroad Company, owning a line of railroad extending from the city of Frankfort, in the county of Clinton, to Kokomo, in the county of Howard, all in the State of Indiana, being about twenty-five miles in length; that on or about said last-named day said company executed and issued its certain two hundred first-mortgage corporate bonds for the sum of one thousand dollars each, payable on the first day of January, 1909, bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July of each year, with a proviso in each of said bonds that in case of non-payment of any half-yearly instalment of interest and the continuance of such default for six months the principal of such a bond should become presently due and payable; that at the same time, to secure the payment of the principal and interest of said bonds, said Frankfort and Kokomo Railroad Company executed, acknowledged, and delivered to said Farmers' Loan and Trust Company its certain deed of trust or mortgage upon its said line of railroad extending from said city of Frankfort to Kokomo, In-
32 diana; that on or before the commencement of this suit one hundred and thirty of the said two hundred bonds were taken up and cancelled by the exchange therefor of that number of the bonds of said Toledo, Cincinnati, and St. Louis Railroad Company of Indiana and Illinois, hereinafter mentioned, and the remainder thereof, to wit, seventy, are outstanding, in the hands of divers holders; that default has been made in the payment of the half year's interest on said seventy bonds which fell due on the 1st day of July, 1883, and in the payment of each subsequent instalment of interest thereon; that there is now due and owing, as prin-

cipal and interest on said seventy bonds, to said Farmers' Loan and Trust Company, as trustee for the holders of said bonds, the sum of eighty-five thousand one hundred and eight dollars and twelve cents.

Second. And the court further finds that afterwards said Frankfort and Kokomo Railroad Company became consolidated with certain other railroad companies of the States of Indiana and Illinois under the name of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois; that said consolidated corporation was created and organized for the purpose of constructing, owning, and operating a line of railroad between a connection with a certain other railroad known as the Toledo, Delphos and Burlington railroad, in the city of Kokomo, Howard county, in the State of Indiana, and extending thence through the counties of Howard, Clinton, Tippecanoe, Montgomery, Fountain, Parke, and Vermillion, in the State of Indiana, and the counties of Vermillion, Edgar, Douglass, Coles, Cumberland, Shelby, Lafayette, Bond, Madison, and St. Clair, in the State of Illinois, to the city of East St. Louis, in St. Clair county, Illinois.

33

That it was the purpose and intention of the directors and stockholders of said The Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois to obtain, through a connection or union of the road of said last-named company with said Toledo, Delphos, and Burlington railroad, a continuous line of railroad extending from the city of Toledo, in the State of Ohio, to said city of East St. Louis, in the State of Illinois.

That afterwards, to wit, on the 23rd day of July, 1881, said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois executed under its corporate seal its three thousand negotiable corporate bonds for the sum of one thousand dollars each, dated the 23rd day of July, 1881, payable in gold coin of the United States on the 1st day of July, 1921, with interest at the rate of six per cent. per annum, payable semi-annually, on the 1st days of January and July of each year, in gold coin, at the city of New York or in London, England, each of said bonds having interest warrants or coupons for thirty dollars each for payment of interest.

34

That, to secure the payment of the interest and principal of all said bonds equally and without preference, said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois did, on said 23rd day of July, 1881, execute and deliver to the complainant, The Central Trust Company of New York, and the defendant, Thomas A. Hendricks, as trustees for the holders of said bonds, its certain indebtedness of trust and mortgage, whereby it granted, conveyed, and confirmed to said trustees, their heirs or successors, forever, in trust, all and singular the line of railroad of said party of the first part as the same then was or might thereafter be constructed between a connection with the Toledo, Delphos and Burlington railroad in the city of Kokomo, Howard county, State of Indiana, and extending thence through the counties of Howard, Clinton, Tippecanoe, Montgomery, Fountain, Parke, and Vermillion, in the State of Indiana, and the counties of of Vermil-

35

lion, Edgar, Douglass, Coles, Cumberland, Shelby, Fayette, Bond, Madison, and St. Clair, in the State of Illinois, to the city of East St. Louis, in St. Clair county, Illinois, being about two hundred and seventy miles in length, together with all and singular the right of way, road-bed made or to be made, its track, laid or to be laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then owned or to be thereafter acquired or then or thereafter appertaining unto said described line of railroad between said points, together with all machinery, supplies, tools, and fixtures then or at any time thereafter held, owned, or acquired by the said Toledo, Cincinnati and St. Louis Railroad Company for use in connection with its line of railroad aforesaid between said points; and all its depot grounds, yards,
36 sidings, turn-outs, sheds, machine shops, leasehold rights then and thereafter owned by the said Toledo, Cincinnati, and St. Louis Railroad Company in connection with its line of railroad aforesaid between said points, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be received or derived therefrom.

That said indenture of trust or mortgage was conditioned for the punctual payment of each instalment of interest and the principal of all said three thousand bonds as the same should, respectively, mature.

That on said 23rd day of July, 1881, said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois executed to the same trustees a certain other indenture of trust and mortgage, whereby it granted and conveyed to said trustees in trust all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the above-described mortgage and the net income thereof to secure the payment at maturity of the principal of its three thousand five hundred other corporate bonds known as income bonds, 2,500 thereof for one thousand dollars each and
37 one thousand thereof for five hundred dollars each, payable on the 1st day of April, 1921, and of such interest on said bonds as might become due thereon according to the terms of said bonds and indenture; that it was by said last-mentioned indenture expressly agreed that interest upon said coupons was not to be due or payable except out of net earnings of said railroad company applicable to such purpose.

That at the time of the execution and delivery of said two indentures of trust and mortgage the railroad of said Toledo, Cincinnati and St. Louis Railroad Company extended and still extends through the county of Montgomery, in the State of Illinois, in addition to the counties named in said indenture, but that the name of said county was inadvertently omitted from the description of said railroad, and that subsequently and before the commencement of this suit, and in order to correct said error in description, a mortgage supplemental to each of the foregoing mortgages or deeds of trust was executed and delivered to said trustees by said Toledo, Cincinnati and St. Louis Railroad Company, whereby the lien of each of

said first-named mortgages or deeds of trust was extended
38 over that portion of said railroad extending through said Montgomery county the same as though that county had been named in said first two mortgages, respectively.

That said first two mortgages were duly recorded in all the counties in the States of Indiana and Illinois through which said railroad extends, and that said two supplemental mortgages were duly recorded in said Montgomery county, Illinois.

That of the three thousand bonds secured by said first-named indenture of trust and mortgage executed by said Toledo, Cincinnati and St. Louis Railroad Company twenty-nine hundred and thirty bonds, amounting to $2,930,000 of principal, were sold and issued and are now outstanding in the hands of divers persons and corporations.

That all of the 3,500 bonds, amounting in the aggregate to $3,000,000 of principal, secured by said second mortgage of said Toledo, Cincinnati and St. Louis Railroad Company have been sold and issued and are now outstanding in the hands of divers persons and corporations, but that no interest is due thereon.

That said Toledo, Cincinnati and St. Louis Railroad Com-
39 pany made default in the payment of its interest coupons pertaining to all said 2,930 outstanding bonds secured by its said first-named mortgage that fell due January 1st, 1883, July 1st, 1883, and January 1st, 1884, before the commencement of this suit, and that it has in like manner made default in the payment of all coupons that have matured since that time, to wit, July 1st, 1888, January 1st, 1885, and July 1st, 1885.

That said interest coupons so overdue and unpaid amount, with the interest thereon, to the sum of six hundred and thirty-nine thousand six hundred and fifteen dollars and thirty-six cents.

Third. The court further finds that so much of said line of railroad described in the aforesaid mortgages as lies between the city of Frankfort, Clinton county, Indiana, and the line dividing the States of Indiana and Illinois, being about sixty miles in length, was constructed by a company known as the Western Construction Company, under a written contract entered into between it and said Frankfort and State Line Railroad Company on the 31st of August, 1880, except eleven and three-tenths miles that had theretofore been built; that it was intended by both parties to the contract
40 that the road to be constructed should become by consolidation a portion of a continuous line of narrow-gauge railroad extending from Toledo, Ohio, to East St. Louis, Illinois.

That in the contract it was provided, among other things, that as payment for the labor and expense of construction the Frankfort and State Line Railroad Company should make and deliver to the construction company its corporate seven per cent. bonds at the rate of ten thousand dollars for each mile of the road, secured by a first mortgage on the road, and should also deliver to it certificates for all the shares of its capital stock, as fully paid up, except so many shares thereof as might be found necessary to fill individual and municipal subscriptions thereto.

That the total number of the shares of capital stock of said Frankfort and State Line Railroad Company amounted at their par value to $2,000,000, and that said construction company received thereof on its said contract a number of shares amounting at their par value to $1,800,000.

In and by said contract it was further, among other things, provided that said bonds so to be paid and delivered to said
41 construction company should bear interest at the rate of seven per centum per annum, payable semi-annually on the first days of January and July of each year, beginning on the 1st day of January, 1881, and should be secured by a first mortgage on all the property, both real and personal, of said railroad company.

The said construction company afterwards pledged all the said shares of capital stock so received by it to secure debts owing by it to subcontractors for work done and materials furnished in the construction of said Frankfort and State Line railroad and other portions of said Toledo, Cincinnati and St. Louis railroad; that by a written contract afterwards, to wit, on the 20th day of April, 1883, entered into between the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Ohio, Indiana, and Illinois, hereinafter mentioned, said Frankfort and State Line Railroad Company, said Western Construction Company, and others, it was stipulated and agreed, among other things, in substance and effect that said Toledo, Cincinnati and St. Louis Railroad Company
42 should assume and pay all the debts of said Western Construction Company for which said capital stock was so pledged, and that upon such payment all said $1,800,000 of capital stock should become the property of said Toledo, Cincinnati and St. Louis Railroad Company, and that the same might be used for the purpose of effecting a consolidation of said last-named company with said Frankfort and State Line Railroad Company, said capital stock meanwhile remaining in pledge as a security for such payment.

That said Toledo, Cincinnati and St. Louis Railroad Company failed, prior to the commencement of this suit and the appointment of a receiver herein, to pay said debts so assumed by it.

That the receiver has, under the authority of the court, paid all the debts assumed by said Toledo, Cincinnati and St. Louis Railroad Company for which said capital stock was so pledged, amounting in all to $——, by making and delivering to the respective creditors receiver's certificates therefor, which are a lien upon said line of railroad extending from Kokomo to East Louis, and as further security for the payment of which he received and
43 now holds the certificates for all said $1,800,000 of such capital stock, and after the payment of said receiver's certificates he will hold such capital stock subject to the order of the court.

It is further found that after the making of said contract of August 31, 1880, by the Western Construction Company and the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois for the construction of the road of the latter company, and before said road was constructed, to wit, on the 9th day of June, 1881, said Western Construction Company and said Toledo, Cincin-

nati and St. Louis Railroad Company of Indiana and Illinois entered into a written contract by which said construction company agreed to build and construct the entire line of said railroad company from said city of Kokomo, Indiana, to said city of East St. Louis, Illinois, through the counties and places mentioned in the aforesaid mortgage, a distance of about 270 miles. As payment for the labor and expense of construction the Toledo, Cincinnati and St. Louis Railroad Company agreed to execute and deliver to the construction company its corporate first-mortgage bonds to the amount of $3,000,000 and its second-mortgage income bonds to the amount of $6,000,000 and its capital stock amounting at
44 its par value to $4,000,000.

That the specifications as to the manner and character of construction of said line of railroad were substantially the same as those contained in said contract of August 31, 1880, for the construction of said Frankfort and State Line railroad.

That the line of said last-named road was coincident with so much of the proposed line of said Toledo, Cincinnati and St. Louis railroad from Kokomo to East St. Louis and was intended as a part thereof, and the construction thereof was continued and completed as in part performance of said contract of June 9, 1881, with the knowledge and acquiescence of said Toledo, Cincinnati and St. Louis Railroad Company and of said Frankfort and State Line Railroad Company.

That after the making of said construction contract of June 9, 1881, it was agreed by and between said Toledo, Cincinnati and St. Louis Railroad Company and said Western Construction Company that the bonds and mortgage of said Toledo, Cincinnati and St. Louis Railroad Company herein first above mentioned should be executed and said entire line built with the proceeds of sales
45 of the bonds, and that the separate mortgage on said Frankfort and State Line railroad provided for in said construction contract of August 31, 1880, should not be executed, inasmuch as it was believed that bonds secured by a general first mortgage on the entire line could be sold more advantageously in the market than bonds secured by divisional or sectional mortgage; that thereupon, with the acquiescence and consent of said Frankfort and State Line Railroad Company, the bonds and mortgages hereinabove mentioned were executed, and with moneys derived from the sale of said bonds said Frankfort and State Line railroad was built.

That upon the completion by said Western Construction Company of said Frankfort and State Line road, to wit, in the spring of 1882, the same was by said Frankfort and State Line Railroad Company turned over to and placed in full possession of said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois as its property and as a part of its said line of railroad extending from the said city of Kokomo to said city of East St. Louis, from and after which time and until taken possession of by the receiver herein the same
46 remained in the exclusive possession of said last-named company and was used and operated by it as a part of the said line.

That a legal consolidation of said Frankfort and State Line Rail-

road Company and said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois was not made for the reason that said companies and said construction company were advised by counsel that such consolidation might operate a forfeiture of certain local aid or municipal subscriptions to the capital stock of said Frankfort and State Line Railroad Company, but that it was still intended by said companies that such consolidation should be made, and that said $1,800,000 of the capital stock of said Frankfort and State Line Railroad Company should be used and voted for that purpose.

That it was known to the directors and active promoters of said Frankfort and State Line Railroad Company that its road was being built with moneys derived from the sale of said bonds of the Toledo, Cincinnati and St. Louis Railroad Company secured by said mortgage embracing its line, instead of moneys obtained
47 by mortgage bonds provided for in said construction contract of August 31, 1880.

It is found that said Central Trust Company of New York and said Thomas A. Hendricks, as trustee for the holders of said 2,930 bonds, now outstanding, secured by said first above mentioned mortgage, and for their benefit have in equity a lien on said Frankfort and State Line railroad, and that the purchaser or purchasers of said mortgaged premises under this decree will, by virtue of such purchase, be entitled to take, hold, and own said $1,800,000 of the capital stock of said Frankfort and State Line Railroad Company.

Fourth. And the court further finds that afterwards, to wit, on the 1st day of March, 1882, said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois and two certain other railroad corporations, viz., the Toledo, Delphoe and Burlington Railroad Company, a corporation of the States of Ohio and Indiana, and the Frankfort, St. Louis and Toledo Railroad Company, a corporation of the State of Indiana, owning together a line of railroad extending from Toledo, Ohio, to East St. Louis, Illinois, by
48 written articles of agreement duly made, executed, and authorized became consolidated into one corporation under the name of the Toledo, Cincinnati and St. Louis Railroad Company, the principal defendant herein.

That the said consolidated corporation became thereby possessed of all the rights, privileges, and franchises of said constituent companies and of all their property of every name and kind, and also became liable for all their debts and obligations of whatever name or kind.

In and by said articles of consolidation all issues of bonds and mortgages securing the same theretofore made by said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois were expressly ratified and confirmed.

It is, therefore, finally ordered, adjudged, and decreed by the court that the defendant, The Toledo, Cincinnati and St. Louis Railroad Company, do pay to the Central Trust Company of New York and Thomas A. Hendricks, as such trustees, the said sum due upon the unpaid and overdue interest coupons appertaining to the bonds se-

cured by said first-mentioned mortgage of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois,
49 to wit, said sum of six hundred and thirty-five thousand six hundred and fifteen dollars and thirty-six cents, with interest thereon at the rate of six per cent. per annum, together with the costs of this suit, taxed at —, within five days from and after the entry of this decree, and that in default of such payment within such time by said defendant, then and in that case said second or income mortgage bondholders shall have the privilege within the next succeeding five days of making such payment, and in default of such payment by any of said defendants or by said bondholders all equity of redemption of said defendant herein and of each and every of them in and to the line of railroad and other mortgaged property herein above described as conveyed to said trustees in trust by said indenture of trust or mortgage executed to them by said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois on the 23rd day of July, 1881, be forever barred and foreclosed, and that all and singular of said mortgaged premises, rights, and franchises be sold as hereinafter ordered and directed and
50 as an entirety, the same being, in the opinion of the court, not susceptible of sale in parts without prejudice to all parties interested therein.

It is further ordered, adjudged, and decreed that upon the sale herein ordered, and upon the delivery to the purchaser or purchasers of the possession of the mortgaged premises, the receiver shall assign and deliver to him or them as his or their property the certificates representing one million eight hundred thousand dollars of the capital stock of the Frankfort and State Line Railroad Company.

And it is further ordered and adjudged and decreed that the purchaser or purchasers of said mortgaged premises shall have all the rights, privileges, and benefits in respect of the terminal property at East St. Louis reserved to such purchaser or purchasers by the order and decree of this court made and entered herein on the 14th day of September, 1885.

Said sale shall be without relief from valuation or appraisement laws and well and free from all right of redemption, and shall be made by William P. Fishback and John McNulta, special masters in chancery, now here appointed to make the same, and a
51 certified copy of this decree delivered to them shall be their authority for making such sale.

It is further ordered and adjudged that said masters in chancery shall give previous notice of the time, place, and terms of such sale by advertisement in one newspaper published in the city of New York, State of New York; one in the city of Boston, Massachusetts; one in the city of Indianapolis, Indiana, and one in the city of Springfield, Illinois, once each week for four consecutive weeks. The first such publication shall not be less than thirty days before the day of sale. Said sale shall be made by public auction, to the highest bidder, at the door of the United States circuit court room, in the city of Indianapolis, Marion county, Indiana. The said

masters are hereby ordered to require a deposit of fifty thousand dollars by each and every separate bidder, or by any number of bidders uniting in one bid, before receiving any bid from such person or persons, which deposit shall be forfeited to the use of the trust in the hands of said trustees if the bidders to whom the property shall be struck off shall fail to pay or to complete said purchase.

52 It is further ordered that in making such sale the said master shall not receive any bid for a less sum than nine hundred thousand dollars.

It is further ordered, adjudged, and decreed that within twenty days from and after the confirmation of such sale the purchaser or purchasers shall pay of the unpaid purchase-money a sum sufficient, together with said deposit of fifty thousand dollars, to pay and discharge the court costs, the masters' fees, solicitors' and counsel fees, and the claims and debts, including taxes legally due on the property, which shall have been then found and finally adjudged to be due and payable as court and receiver's indebtedness, and to be paramount in equity to the lien of said indenture of trust or mortgage herein decreed to be foreclosed, excepting such final decrees for the payment of moneys out of said fund as may have been superseded by and upon proper appeal, and upon such payment by such purchaser or purchasers he or they shall be let into the possession, use, and enjoyment of the said railroad and property, subject to the conditions and stipulations hereinafter contained.

53 Upon confirmation of any sale to be made under this decree, and upon payment within twenty days thereafter of such part of the purchase-money as may be required to comply with the provisions and directions of this decree, the master shall make, execute, and deliver to the purchaser or purchasers a deed conveying to him or them all and singular the mortgaged premises and franchises so sold and purchased.

Said deed shall contain an express stipulation reserving to the court, and the court does hereby reserve, full power, upon default of the purchaser or the purchasers in complying with any of the provisions or requirements of this decree respecting payment of the purchase-money, to retake, through its receiver, possession of all or any part of the mortgaged premises so sold and forthwith sell the same or any part thereof upon its order to that effect made and entered. Said deed shall also contain a stipulation that the purchaser or purchasers, or his or their assigns, shall forthwith yield possession of said mortgaged premises in compliance with such order of court to be made upon default in the payment of

54 purchase-money. Upon the delivery of said deed by the masters to the purchasers the receiver and all persons acting by or under his authority shall deliver possession to the purchaser or purchasers on production of the master's deed or other proper evidence of the execution and delivery thereof of all said mortgaged premises, and shall also surrender and deliver up to such purchaser or purchasers all books of account and records in his hands as such receiver.

The residue of the purchase-money not required to make the payments hereinabove required to be made prior to the delivery of possession shall be paid by the purchaser or purchasers from time to time as paramount claims against the fund may be finally ascertained by decree of the court, such payments to be made upon twenty days' notice by the master, pursuant to the order of the court to that effect entered requiring such payments, until the entire purchase-money shall have been paid. If any surplus of the purchase-money shall remain after full payment of the court and receiver's indebtedness the same shall be distributed *pro rata* upon the coupons and bonds secured by the indenture of trust and mortgage hereby foreclosed.

55 Provided, however, in case said mortgaged premises shall bring at such sale a price per mile exceeding ten thousand dollars and interest thereon at the rate of seven per centum per annum from the first day of January, A. D. 1881, then it is ordered that the masters making the sale shall bring into court all such excess representing said sixty-seven miles of road known as the Frankfort and State Line railroad, to abide the further order of the court as to the distribution thereof.

If any surplus shall remain after full payment of said overdue coupons and bonds secured by said first-named mortgage of July 23, 1881, such surplus so remaining shall be distributed *pro rata* upon said thirty-five hundred income bonds.

In making payment of any surplus of purchase-money that may be left after full payment of costs, allowances, and court and receiver's indebtedness the purchaser or purchasers shall have the privilege of paying such surplus with the interest coupons and bonds to which the same may be applicable, as hereinabove provided, at such price as the holder thereof would be entitled

56 to receive in cash if the entire purchase-money were paid in cash.

The holder or owner of any claim finally adjudged or conceded to be due and payable out of said fund prior to said mortgage bonds and coupons who may become a bidder at such sale shall have the privilege of turning in his said claim as part of the purchase-money at such price or sum as he would be entitled to receive thereon out of the proceeds of sale.

To the end that all just claims against said property may be speedily adjusted and allowed; that all persons, firms, and corporations having or asserting any claims against said property accrued while said property has been in the possession of the court, whose claim or claims have not already been presented and filed, shall, within sixty days after the entry of this decree, present and file in this court such claim or claims showing upon its face when and where it accrued and upon what it is founded; and it is directed that the master, in his notice of sale as hereinabove required, shall make proper mention of this order, which shall be all the

57 notice thereof required to be given, and all persons, firms, and corporations not having filed their claims within sixty

days, as herein provided, shall be, and they are hereby, barred and foreclosed.

But this order shall not apply to operators or employees rendering or having rendered services to the receiver herein whose names and services appear on the pay-rolls of the receiver.

The distribution of the proceeds of the sale of said railroad and mortgaged premises under this decree shall be as follows:

First. To court costs and masters' fees as the same may hereafter be ascertained.

Second. To said Farmers' Loan and Trust Company said sum of eighty-five thousand one hundred and eight dollars and twelve cents, due on said bonds and coupons of said Frankfort and Kokomo Railroad Company.

Third. To court and receiver's indebtedness and solicitors' and counsel fees.

Fourth. *Pro rata* distribution upon the coupons and bonds secured by the indenture and mortgage by this decree foreclosed.

Fifth. *Pro rata* distribution upon the income bonds hereinbefore mentioned.

58 Leave is hereby reserved to said trustees and to the purchaser or purchasers at the foreclosure sale under this decree to appeal from any order or final decree made by the court directing the payment of claims as prior and paramount to said mortgage bonds and coupons.

It is ordered that the clerk of this court do forthwith make and deliver to the circuit court of the United States for the southern district of Illinois a certified copy of this decree.

And it is further ordered that any or either of the parties to this cause may apply to the court for such other and further directions at the foot of this decree as may be necessary to carry it into effect, according to its true intent and meaning.

The counsel for the defendants, The Frankfort and State Line Railroad Company and John S. Smith and Elverton R. Chapman, requested and moved the court to insert in the foregoing decree a provision requiring the Toledo, Cincinnati, and St. Louis Railroad Company to return to the possession of the Frankfort and State Line Railroad Company certain rolling stock and tools that had been delivered by said last-named company to said first-

59 named company at the time of the delivery of possession of said Frankfort and State Line road, said property being described by the witness, James H. Rice, as the following:

"One locomotive, 3 or 4 flat cars—construction cars—and several hand-push cars and some tools."

Which motion and request was disallowed by the court.

And thereupon said Frankfort and State Line Railroad Company, said John S. Smith, and said Elverton R. Chapman prayed an appeal from this decree to the Supreme Court; and thereupon the complainant made a counter-motion that said Smith and Chapman, not being proper parties to this suit, be dismissed therefrom as defendants; which counter-motion was disallowed by the court.

And the court granted said prayer for an appeal, upon condition

that the appellants file a supersedeas bond, with sufficient sureties, to be approved by the court, in the sum of eight hundred thousand dollars and a cost bond in the sum of one thousand dollars.

And afterwards, to wit, at the November term of said court, on the 28th day of April, 1886, before the Honorable William
60 A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the Frankfort & State Line Railroad Company, by counsel, and files its appeal bond herein in the sum of one thousand dollars, with James H. Rice and C. A. Zollinger as sureties thereon; which bond is approved by the court.

61 To the honorable court:

The master to whom this cause was referred to take testimony and report the same to the court now respectfully reports as follows:

I was attended at the hearing by the following counsel: A. W. Hendricks, for The Central Trust Company; A. C. Harris and W. H. Calkins, for The Frankfort and State Line Railway Company & for Smith; F. Winter for Chapman.

The following is a list of the items of evidence produced, and which are filed beneath as part of this report, viz:

(1.) Testimony of William J. Craig, taken before me at Indianapolis June 9, 1885, together with Exhibits A, B, C, introduced in connection with and as a part of said testimony.

(2.) Testimony of Alfred A. Thomas, taken before me at Indianapolis on the — day of ——, 1885.

(3.) Agreement as to the evidence, with exhibit attached, signed by F. Winter for C. R. Chapman, Harris and Calkins for F.
62 and S. L. R'y Co. and Smith, and Baker, Hord and Hendricks for the Central Trust Company.

(4.) Testimony of W. J. Craig, taken October 10, 1885, and by agreement of parties to be regarded as taken in the presence of the master and by him.

(5.) Testimony of James H. Rice, taken by agreement at the law office of Harris and Calkins in Indianapolis, October 31, 1885, and to have same effect as if taken in the presence of the master.

(6.) Copy of the articles of consolidation of the Toledo, Cincinnati and St. Louis Railroad Company with the Frankfort and Kokomo Railroad Company, dated May 26, 1881.

(7.) Copy of the articles of association of the Toledo, Cincinnati and St. Louis Railroad Company, dated February 12, 1881.

(7.) Copy of the articles of association of the Toledo, Cincinnati and St. Louis Railroad Company, dated March 19, 1881.

(8.) Copy of the articles of consolidation of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois,
63 with the Toledo, Cincinnati and St. Louis Railroad Company of Illinois, dated October 4, 1881.

(9.) Copy of the articles of consolidation of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, and

the Toledo, Delphos and Burlington Railroad Company, and the Frankfort, St. Louis and Toledo Railroad Company into the Toledo, Cincinnati and St. Louis Railroad Company, dated February 25, 1882.

(10.) Copy of the articles of association of the Frankfort, St. Louis and Toledo Railroad Company, dated April 4, 1876.

(11.) Copy of the articles of the Frankfort, St. Louis and Toledo Railroad Company, the Kokomo and Marion Railroad Co., and the Marion and Ottawa Railroad Company into the Frankfort, St. Louis and Toledo Railroad Company, dated April 22, 1876.

This was all the evidence produced at said hearing, and I hereby certify that it is all contained in and attached to this report, which is respectfully submitted.

November 2, 1885.

WILLIAM P. FISHBACK, *Master*.

Complainants, at the hearing, also produced in evidence the two original and the two supplemental mortgages mentioned in the bill of complaint.

A. W. H.

64 In the Circuit Court of the United States for the District of Indiana.

It is agreed by the parties to the above-named consolidated suit as follows:

First. That Exhibit A of the deposition of William J. Craig in this case is a true copy of the original contract of which it purports to be a copy, and that the same may be read in evidence on final hearing without producing the original or further accounting for its absence.

Second. That Exhibit B of said deposition is a true copy of the original contract of which it purports to be a copy, and that it may be read in evidence on the final hearing without producing the original or further accounting for its absence.

Third. That Exhibit No. 2, filed with the master's report on the intervening petition of Henry McPherson in the suit of Gernville D. Braman against The Toledo, Cincinnati and St. Louis Railroad Company, pending in said court, a copy of which is hereto
65 annexed, is a true copy of the original contract of which it purports to be a copy, and that it may be read in evidence on the final hearing without producing the original or further accounting for its absence.

Fourth. Either may produce and read in evidence on the final hearing certified copies of any of the articles of consolidation of railroad companies constituting the existing Toledo, Cincinnati and St. Louis railroad, provided the same shall be deemed by the court to be pertinent and competent.

Fifth. All the evidence taken, including that provided for in this agreement, shall be read on final hearing, as applicable to the question of fact at issue between said complainants and the Frank-

fort and State Line Railroad Company, the same as though it had been taken after the filing of the answer of said last-named company.

66 Sixth. This agreement shall be filed and made a part of the record of said suit.

F. WINTER,
For C. R. Chapman.
HARRIS AND CALKINS,
Att'ys for F. and S. L. R'y Co. and Smith.
BAKER, HORD AND HENDRICKS,
Sol'l'rs for Central Trust Co.

Whereas the Western Construction Company entered into a contract with the Frankfort and State Line Railroad Company, which has been substantially performed, whereby said construction company was to receive the whole of the capital stock of said Frankfort and State Line Railroad Company, which was two million dollars par value, less what might be required to be issued for subscriptions by other parties and for tax and local aid; and

67 Whereas said State Line railroad was intended to be a part of the line of the Toledo, Cincinnati and St. Louis railroad, extending from Kokomo, Indiana, to East St. Louis, Illinois, and has been in fact built by the proceeds of the Toledo, Cincinnati and St. Louis railroad mortgage laid upon its line between the points aforesaid; and

Whereas said Western Construction Company, for value, agreed to sue and assign its right and title to said stock to the trustees of the Delphos trust for the sole purpose of effecting a consolidation of said Frankfort and State Line Railroad Company with said Toledo, Cincinnati and St. Louis Railroad Company, and of them turning the said stocks into said Toledo, Cincinnati and St. Louis Railroad Company in full settlement of all construction contracts; and

Whereas, as a condition of said sale and assignment of said stock by said Western Construction Company, it was agreed that the same

68 should be held back and reserved and not be deliverable until certain debts and obligations of said Western Construction Company contracted in building said railroad should be paid and said Western Construction Company released therefrom; and

Whereas it is agreed that a full and true schedule of said debts and obligations is hereto annexed, marked "A," and made part of this agreement:

Now, therefore, the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the State of Ohio, Indiana, and Illinois, party of the first part hereto; the said Frankfort and State Line Railroad Company, party of the second part; said Western Construction Company, party of the third part; the American Loan and Trust Co., of Boston, party of the fourth part, and each of said creditors of said Western Construction Company embraced in said Schedule "A," as signed — this instrument, parties on their respective parts hereto, and in consideration of the mutual obligations herein, do make this agreement.

Item 1. Said Toledo, Cincinnati and St. Louis Railroad
69 Company, party of the first part, hereby assume of said debts and obligations set forth in said Schedule "A" the obligations specified in Schedule "B," which Schedule "B" is made a part hereof and is annexed hereto, and agree to pay the same as set forth in said Schedule "B."

Item 2. Said Frankfort and State Line Railroad Company hereby admits full and sufficient performance of contract for its construction with said Western Construction Company and hereby agree to deliver forthwith, so far as may be, the balance of its capital stock due under said contract, to wit, the sum of eighteen hundred thousand dollars ($1,800,000) for value of its said stock.

Item 3. Said Western Construction Company hereby delivered to said American Loan and Trust Co. said eighteen hundred thousand dollars ($1,800,000) for value of the capital stock of said Frankfort and State Line Railroad Company in and for the following trust:

70 Said loan and trust company shall hold said stock as security for the payment by said party of the first part of the debts set forth and at the time specified in said Schedule "B." Should the same be so paid, then said trust shall have been executed and said stock shall be delivered by said trust company to Elmer P. Horn, or in the event of his death to the then chairman of the executive committee of said Toledo, Cincinnati and St. Louis Railroad Company, and freed from any further duty or liability on the part of said trust company in relation thereto.

Should any of the said debts specified in Schedule "B" not be punctually paid as therein stipulated, all of the said debts shall at once become due, and then said trust company may, on *on* written demand by any of said creditors, *shall* after thirty days' notice to said party of the first part of its intention so to do, sue the same or so much thereof as shall be necessary to pay all the remaining or unpaid indebtedness specified in said Schedule "B" for cash, and apply the sum so received, after paying the necessary ex-
71 penses of said sales, in payment of said indebtedness. Such sales shall be at public auction, after thirty days' notice advertised in the Boston Journal and in the Missouri Republican of St. Louis, Missouri, a copy of either said papers containing such notice to be mailed by said trustee, twenty days previous to such sale, to each of said creditors named in Schedule "B" at the address therein given.

Item 4. Said Frankfort and State Line Railroad Company shall, after satisfying as soon as possible the legal demands of subscribers to its stock and for local aid and tax received as provided in its contract with the said Western Construction Company, deliver over the remaining balance of its said stock to said trust company, to be held on the — set forth in this instrument the same as the stock previously delivered.

Item 5. Said creditors specified in Schedule "B" agree to accept said sums therein stated and payable at the times therein specified in full settlement and payment of all amounts due under

72 their contracts, and on the payment of the same in full to execute releases for the same, and of all other claims and demands of every nature and description to said parties of the first, second, third, and fourth parts hereto, and to Daniel Ahe, Jr., and to receive from said parties like release.

Item 6. No new suits shall be begun by any of said creditors on said contracts or otherwise upon any of the debts specified in Schedule "B" hereof against any of the parties hereto until default in some payment provided in said schedule, and until the like default no further proceedings shall be had in any pending suit by any party hereto, but the same shall be continued and remain *in statue quo*, nor shall anything herein be held to release or defeat any existing line, nor shall the execution or acceptance of any note for any debt specified in Schedule "B" by any creditor therein named be an extinguishment of the original debt until the same shall be paid.

Item 7. It is agreed that the legal title to said stock shall be placed in said trustee, & said stock shall not be voted until said debts in Schedule "B" are paid in full, except for the purpose of
73 keeping up the organization of said company by the election of directors.

Item 8. This agreement to apply to and include only such of said creditors specified in Schedule "A" as shall sign the same within ninety days from March 20, 1883, and the signature of said trust company hereto shall bind said trust company only to an acceptance of said trust and the obligation to perform its conditions.

Witness our hands this (20) twentieth day of March, A. D. 1883.

THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD CO.,
By HERBERT STEWART, *Treasurer.*
AMERICAN LOAN AND TRUST COMPANY,
By N. W. JORDAN, *Actuary.*
THE WESTERN CONSTRUCTION COMPANY,
By W. J. CRAIG, *President.*
THE FRANKFORT STATE LINE RAILROAD CO.,
By A. A. THOMAS, *President.*
PATRICK DOWLING,
By JOSEPH DICKSON, *Att'y.*
H. S. HOPKINS AND COMPANY.
COCHRAN AND BROWN.
THE IOWA CONSTRUCTION COMPANY,
By C. H. SMITH, *President.*
BEESON AND HAMMOND,
By RICHARD ALNEY, *Att'y.*

By Power on File with A. L. and T. C.

74 SCHEDULE A.

List of Claims.

H. S. Hopkins and Co. 33,861 25
Cochran and Brown 17,790 73

Also a claim for rebuilding "Osaw T-estle," if it shall, within the time provided in the foregoing agreement, be determined that any sum is due on this claim; or if within such time any sum shall be agreed upon as due by way of compromise, such sum shall be entered against this claim in this schedule and transferred to Schedule "B" hereof.

4,500 00
W. F. Richie & Co. 1,138 90

Also a claim for ties and lumber used, which have never been estimated. When the amount due on this claim shall have been agreed upon or determined, if so agreed upon or determined within the time in that behalf provided in the foregoing agreement, it shall be entered against this claim in this schedule and transferred to Schedule "B" hereof.

Kapp and Company 1,924 42

75 Amount guaranteed correct by W. J. Craig; if found incorrect it shall be corrected.

Schedule A (Continued).

Patrick Dowling .....

A claim for grading, excavation, track-laying, extra work, and damages. When the amount due on this claim shall have been determined or agreed upon within the time in that behalf provided in the foregoing agreement, it shall be entered against this claim in this Schedule and transferred to Schedule B hereof.

The Iowa Construction Company 37,500 00
Beeson and Hammond 12,940 62
Patrick Dowling 3,750

76 SCHEDULE B.

Name and residence.	Amount of debt.		Settlement.	
H. S. Hopkins & Co., St. Louis, Mo.	Prin.	33,861 25	Cash	3,386 12
	Int.	1,392 90	Note, April, '83, 6 mos.	7,851 40
		35,254 15	" " 8 "	7,929 20
			" " 10 "	8,002 63
			" " 12 "	8,084 80
				35,254 15
Cochran & Brown, Columbus, Ohio.	Prin.	22,290 73	Cash	2,229 07
	Int.	927 10	Note, April 3, '83, 6 mos.	5,169 94
		23,217 83	" " 8 "	5,221 44
			" " 10 "	5,272 94
			" " 12 "	5,324 44
				23,217 83
W. F. Richie & Co.				
Kapp & Co., Bluffton, Ind'a.				
Iowa Construction Co., Mt. Pleasant, Iowa.		37,500 00	Cash	3,750
	Int.	1,535 07	Note, April 3, '83, 6 mos.	8,694 33
		39,035 07	" " 8 "	8,779 21
			" " 10 "	8,863 57
			" " 12 "	2,121
			" " 12 "	1,484 70
			" " 12 "	1,000 26
			" " 12 "	1,060 50
			" " 12 "	1,060 50
			" " 12 "	1,060 50
			" " 12 "	1,060 50
Patrick Dowling, Holland, Ohio.	Prin.	3,750	Cash pay't	375
	Int.	151 84	Note, 6 months	386 25
		3,901 84	" 8 "	482 81
			" 8 "	877 50
			" 10 "	885 93
			" 12 "	894 35
				3,901 84
77				
Beeson & Hammond, by Richard Alney, att'y, Kosciusko, Miss.		$12,940 62	Cash	1,314 48
	In't from Jan. 23, '83, 6 mos., to April 3, '35—8 mos.	204 16	Note, April 3, '83, 6 mos.	3,046 30
	Int. on note	532 34	" " 8 "	3,075 87
		13,677 12	" " 10 "	3,105 45
			" " 12 "	3,135 02
				13,677 12

Before W. P. Fishback, master in chancery, to whom this case was referred, the following evidence was taken at his office, Indianapolis, Indiana, June 9th, 1885, at 2.00 o'clock p. m.

Appearances: For the trustees, Col. A. W. Hendricks; for E. R. Chapman, F. Winter; for John J. Smith, A. C. Harris.

WILLIAM J. CRAIG, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the matters at issue in said cause, testifies as follows:

Examined by Col. A. W. HENDRICKS:

Q. 1. State if you are the same William J. Craig who is the receiver in this case.

A. I am.

78 Q. 2. Have you had any connection with any of the roads forming the present Toledo, Cincinnati and St. Louis system? And, if so, please state in a general way what and how long.

A. I had nothing to do with any of the road between Kokomo and St. Louis, except in connection with the construction department. I did operate the Frankfort and Kokomo road as general manager of that portion of it while it was a standard-gauge road, but it was in connection with construction duties.

Q. 3. Were you connected with the construction of any other roads than the Frankfort and Tokomo?

A. Yes, sir; I constructed nearly the whole of the St. Louis Division; a portion of the Toledo Division; a portion of the Dayton Division, and, indirectly, a portion of the Dayton and Southeastern Division and the Cincinnati Division.

Q. 4. You say you did it? Do you mean it was done by yourself personally or by the company with which you were connected?

79 A. I attended to the details myself, but it was as president of the Western Construction Company that had the contract.

Q. 5. What was the Western Construction Company? Was it a corporation or partnership?

A. It was a corporation.

Q. 6. And of Ohio?

A. Yes, sir.

Q. 7. You may state what roads constitute that portion of the T., C. and St. L. between Kokomo and East St. Louis?

A. The local companies were the Frankfort and Tokomo, Frankfort and State Line, the Tuscola, Charleston and Vincennes, and the Charleston, Neoga and St. Louis. There was, however, a corporation called the Vermillion and State Line road, but it never built any road and there never was any road built under its name. It was used merely in the consolidation. All the other roads built their line of railroad, or it was built over their line.

80 Q. 8. You have stated, I believe, that the Western Construction Company built the road between Frankfort and the State Line.

A. Yes, sir.

Q. 9. Was that road built under written contract and, if so, between whom?

A. Between the Western Construction Company and the Frankfort and State Line Railroad Company.

Q. 10. Where is the original of that contract?

A. I do not know; I have not seen it for three years.

Q. 11. And have no idea where it is?

A. No, sir; I have no idea. I left it in the office at St. Louis.

Q. 12. When was it left there?

A. Next month will be three years.

Q. 13. In whose charge was it left?

81 A. I left it in the Western Construction Company's office.

Q. 14. Who had charge of those papers afterwards, so far as you know?

A. Daniel Ahl, Jr., Boston.

Q. 15. Do you know of any record being made of that contract?

A. I kept a large book in which I caused to be recorded all contracts for the Western Construction Company.

Q. 16. Was any copy of that record made?

A. Yes, sir.

Q. 17. Please look at the paper that I now show you and say whether that is the copy to which you refer.

A. Yes, sir; that is copied from the record of the contracts.

Q. 18. State whether you believe that to be a true copy of the contract between the Western Construction Company and the Frankfort and State Line Railroad Co.

82 A. I do.

Q. 19. Will you please produce a copy of that contract and make it an exhibit as a part of your deposition?

A. I herewith produce a copy, marked "Exhibit A," which is what I believe to be a true copy of that paper and that which I had taken from my record. There is another copy that I brought with me, but I do not know who made it.

(By A. C. HARRIS:)

Q. 20. I will ask you whether you ever compared this copy after it was made out with the writing on the book that you spoke of?

A. I did not.

By Col. A. W. HENDRICKS:

Q. 21. Tell the manner in which the copy was made.

A. A young lady clerk in our office made the copy. I opened the book and showed her what I wanted copied and she made it.

Q. 22. State, if you please, whether the road was actually built under that contract.

83 A. The greater portion of it was. Eleven and three-tenths miles was built before the execution of that contract, from the Vandalia crossing in Frankfort, Ind., to the Big Ford crossing in Clark's Hill.

Q. 23. That portion had been built, had it, before the contract was made?

A. Yes, sir.

Q. 24. Can you recollect at what time the consolidation resulting in the Toledo, Cincinnati and St. Louis of Illinois and the Toledo, Cincinnati and St. Louis of Indiana was formed?

A. By referring to a book, which I know to be correct—Gov. Cox's report—I can. It was in October, 1881.

Q. 25. State if the Western Construction Company entered into any contract with that T., C. and St. L. for the construction of a road?

A. Yes, sir.

Q. 26. That was in writing, was it?

A. Yes, sir.

84 Q. 27. Do you know where the original of that contract is?

A. No, sir; I do not. It was executed in duplicate and my copy of it was with the Frankfort and State Line and other contracts.

Q. 28. Where would that probably be now?

A. I have not the remotest idea, unless it is in Boston.

Q. 29. I- whose hands would it likely be, if it is there?

A. It would likely be in Mr. Ahl's hands. There is a bare possibility of its being among some of my papers at Toledo, but I think not. I have in my office there a lot of papers which came from the Boston office of the company. I have telegraphed and will know between now and night whether I have a copy of that.

Q. 30. When you return, will you please have a careful search made for that paper?

A. Yes, sir.

85 Q. 31. Do you remember the date of that contract I last referred to?

A. No, sir; I do not. It was in 1881 some time.

Q. 32. Was that contract copied into this record book of contracts that you referred to a moment ago?

A. Yes, sir.

Q. 33. Did you have any copy made of that contract?

A. Yes, sir; I had a copy made at the same time that other was made and by the same person.

Q. 34. Please look at the paper I now show you and say whether that is the copy.

A. I believe it is—yes, sir. If this is the paper I sent you it is certainly the copy to which I refer. (It is admitted that the paper referred — is the paper that Mr. Craig sent to Col. Hendricks.)

Q. 35. Will you please produce that paper as a part of your deposition?

86 A. I herewith produce said copy and it is marked Exhibit "B."

Q. 36. In what way was this copy procured that you speak of?

A. You requested me to furnish you copies. This record of contracts from which these copies were taken is still in my possession. I had the copies made by Miss Orbison, a lady clerk in our office.

(By A. C. HARRIS:)

Q. 37. State whether you compared this paper which is now before us, Exhibit "B," with the copy put upon the book which you mentioned, after it was made by the clerk.

A. I did not.

(By Col. A. W. HENDRICKS:)

Q. 38. Did you examine any part of it, head or foot, if you remember?

A. No; I cannot say that I did. I probably looked at it to see whether it was right. I do not remember, though, of making any special inspection of it.

87 Q. 39. Was the construction of the Frankfort and State Line road completed by the Western Construction Company?

A. Yes, sir.

(By A. C. HARRIS:)

Q. 40. State whether this book from which these papers were copied was made by you in your handwriting or made by some other parties.

A. No, sir; it was kept by the auditor of the Western Construction Company.

Q. 41. By whom were these writings put upon that book of which these purport to be copies?

A. That Toledo, Cincinnati and St. Louis contract was copied by a man named Ed. Springer, who has been here in Indianapolis a great deal.

Q. 42. By whom was the other spread upon the book?

A. I do not recollect. I could tell if I saw the book.

(By Col. A. W. HENDRICKS:)

Q. 43. Please state whether this copy, Exhibit A, and the other paper, marked Exhibit B, were made by persons in your employ in your business and in the usual, regular course of business.

88 A. Yes, sir; they were.

Q. 44. You may state whether the Western Construction Company received the stock and the bonds provided for in the contract with that company, being the contract marked Exhibit A—the contract with the Frankfort and State Line.

A. It did receive the stock, but it did not receive the bonds.

Q. 45. Please state why it did not receive the bonds.

A. We never asked them for them.

Q. 46. Why did you not ask them for them?

A. Well, for convenience. I mean that if it was to be consolidated with the Toledo, Cincinnati and St. Louis railroad, as it was originally intended, it would be more convenient not to find mortgage records in the various counties, which would have to be satisfied, and it would prevent searching after scattered bonds in case any of them would get away from us. I mean that if the mortgage was

placed on record and bonds issued, in order to put a consoli-
89 dated mortgage on record and satisfy this local mortgage it it would be necessary to gather up all the bonds and cancel them and satisfy the mortgages in the various counties. That is what I mean by its being more convenient not to find the local mortgage on record.

Q. 47. Is there anything in that contract between the construction company and the T., C. and St. L., which you have furnished us, being Exhibit B, that furnishes a reason why you did not call for the bonds of the Frankfort and State Line Company?

A. I do not remember anything special in the contract.

Q. 48. Do you remember whether that contract with the T., C. and St. L. Co. provided for the issuance of a bond on the entire line of the T., C. and St. L. between Kokomo and East St. Louis and whether you were to take some of these bonds for the payment of the construction of the line between Kokomo and East St. Louis?

A. The contract provided for the construction of the T., C. and St. L. railroad from Kokomo to East St. Louis and the issuing of, I think, $3,000,000 first-mortgage bonds and $3,000,000 second, and $4,000,000 of stocks.

90 Q. 49. Do you mean to be understood that, instead of demanding the bonds provided for in your contract with the Frankfort and State Line Co., *that* you took the bonds of the T., C. and St. L. Co., secured by that mortgage, as provided for in this contract?

A. I presume we did.

Q. 50. State why you presume so.

A. Because I do not know enough about it to answer you fully.

Q. 51. What reasons have you for supposing it?

A. I did not hold the bonds; there treasurer of the company did. He was located in the office — Geo. and Wm. Balloo, New York city, and Wm. Balloo was the fiscal agent of the Western Construction Co. and handled the finances in the East in his own way.

Q. 52. You know that you did not either ask for or receive the Frankfort and State Line bonds?

A. I know that; yes, sir.

91 Q. 53. And you know the money used in building the road came from Mr. Balloo, who was placing these T., C. and St. L. bonds?

A. Yes, sir. I made my drafts on him, and never enquired where he got his money to pay them. I know, of course, he was handling the bonds of the entire system.

Q. 54. I will ask you if any consolidation of the Frankfort and State Line was formed, as provided for in the contract, with the Frankfort and State Line R. R. Co.

A. It was not.

Q. 55. State why, please.

A. Because our attorney advised us that if we consolidated the Frankfort and State Line with any other company *that* it would prevent the collection of a very considerable amount of local aid which had been voted by the townships along the line of the road.

Q. 56. State whether a future consolidation was still kept in view and whether it was treated practically as though a consolidation.

Objected to by A. C. Harris. The last clause of the question does not assume to ask the witness what was done or not done, but it asks for an opinion upon what was done or not done.

A. A future consolidation has been kept in view.

92 Q. 57. State, if you please, by what contract, or right, or authority the T., C. and St. L. Co. has been using the Frankfort and State Line road as a part of its line, if such be the fact.

A. I do not know of any contract—in fact, I know there is no contract.

Q. 58. Has there ever been one?

A. There never has been one.

Q. 59. After the construction contract with the T., C. and St. L. Co. was entered into, state whether or not it was the design that the construction of the Frankfort and State Line road should be taken as a part performance of the contract with the T., C. and St. L.

Objected to by Mr. Harris.

A. I so understand it, and I think it was understood generally so.

Q. 60. What was the intention of the construction Co.?

A. We expected to cause it to be consolidated, as stated in our contract.

Q. 61. If the Western Construction Co. went on and completed its contract with the Frankfort and State Line Co. who would be the virtual owner of the Frankfort and State Line road under the contract? Who would own its stock and bonds?

A. The Western Construction Co.

Q. 62. Then in this contract with the T., C. and St. L. you contracted to build the entire line from Kokomo to East St. L.,

93 and to put this Frankfort and State Line road in as a part performance of that contract?

A. We did not contract to do that, but we expected to.

Q. 63. What I mean is, you contracted with the T., C. and St. L. to complete its entire road from Kokomo to East St. Louis, did you not?

A. Yes, sir.

Q. 64. Now, you are at the same time building the Frankfort and State Line road under a contract by which it will virtually become your own when finished?

A. Yes, sir.

Q. 65. You built that as a part performance of the T., C. and St. L. contract, did you, and turned it in on that contract?

Objected to by Mr. Harris.

A. Yes, sir.

Q. 66. At the time the mortgage in suit, of July 23, 1881, was executed, what was the line, actual or contemplated, of the T., C. and St. L. Co. between Frankfort and the State Line?

A. The same as it is now.

Q. 67. Do you know of any outer line that was ever located or contemplated to be completed between those two points?

A. No, sir.

Q. 68. Where did you live at the time that mortgage of July, 1881, was made?

94 A. I was temporarily living at Frankfort; was located there about eight months.

Q. 69. Where did the principal promoters of the Frankfort and State Line road live at that time?

A. They lived in Frankfort. There were several very active men, though, on the line of the road. The active men outside of Frankfort were Isaac Porter, of Danville, Ill., who owned a large body of land in Vermillion county, Indiana, near our line; Cail Waterman, of Fountain county; John Wingate, of Montgomery county, and D. D. Clark, of Clark's Hill. The remainder of the real active men lived in Frankfort to the number of half a dozen.

Q. 70. Was the fact of the execution of that mortgage known to these men who were directors and active promoters of the Frankfort and State Line road?

A. I presume so.

(By Mr. HARRIS:)

Q. 71. Do you know?

A. I do not know.

(By Col. A. W. HENDRICKS:)

Q. 72. State the facts upon which you base your presumption.

A. It was recorded right there in their town, and there never was any secret made of it.

Q. 73. Did you ever hear from any of those gentleman or any officer or any stockholder of the Frankfort and State line Co.

95 any objection to the placing of that mortgage?

A. No, sir.

Q. 74. Are you able to say whether it was known to them that the Frankfort and State Line road was being built with the proceeds of the sale of the T., C. and St. L. bonds?

A. I do not know. Of course they did not know where the money came from. They did not have anything to do with the building of the road, the hiring of the engineer, or the letting of contracts or carrying them out at all—not a bit more than they had after we moved our office to St. Louis.

Q. 75. They knew, did they not, that it did not come from the proceeds of the Frankfort and State Line R. R. Co.'s bonds?

A. Yes; they knew that, because there were no Frankfort and State Line bonds. The Frankfort and State Line bonds were printed and were in the First National Bank in Frankfort. The president of that bank, Mr. Carter, was made trustee of the local bonds, but they were never signed, never handed over, and the mortgage never was recorded.

Q. 76. State, if you can, whether it was the intention of the Frankfort and State Line R. R. Co. and the construction Co. to issue and

place those bonds up to the time of the contract with the T., C. and St. L. Co.

96 A. So far as the Frankfort and State Line Co. was concerned, I hardly know what to say. Of course they would have issued them at any time we would have called on them to do so. They were compelled to make the contract.

Q. 77. Did you abandon the idea of calling on the Frankfort and State Line Co. for the bonds before the time provision was made for issuing the T., C. and St. L. bonds that you took in lieu of them?

A. Yes, sir.

Q. 78. When you abandoned that idea, then, what did you expect to get your pay in?

A. We expected to consolidate the Frankfort and State Line road with other companies and form the T., C. and St. L., and have Mr. Blur sell all the bonds and get our pay out of it.

Q. 77. Why did you abandon the idea of getting those Frankfort and State Line bonds until you knew you could get something equivalent and that you preferred to take?

A. We knew that there could be a T., C. and St. L. contract.

Q. 78. You still expected to be paid for your work, didn't you?

A. Certainly.

Q. 79. And when you concluded not to take the Frankfort and State Line bonds what did you expect to take in lieu?

97 A. The T., C. and St. L. bonds.

Q. 80. You mean by that the bonds secured by this mortgage of July 23, 1881?

A. Yes, sir; if that is the date of the mortgage.

Q. 81. The mortgage now in suit?

A. Yes, sir.

Q. 82. I understand you to say that you got the stock provided for in your contract with the Frankfort and State Line Company?

A. Yes, sir; about all of it.

Q. 83. What was done with that stock?

A. I have it. It was issued to me as president of the Western Construction Co., and finally it was placed by me, under a trust agreement between various parties, in the hands of the American Loan and Trust Company of Boston to secure certain creditors of the Western Construction Company, and about a year ago these claims were adjusted by issuing receivers' certificates to those parties, and the stock was ordered back into my hands, and I have it now.

Q. 84. You got it first as president of the Western Construction Co.?

A. Yes, sir.

Q. 85. And it is now in your possession as receiver of the T., C. and St. L. Co. Is that what you mean?

98 A. Yes, sir; that is what I mean.

Q. 86. Was the contract under which this stock was placed in the hands of the trust Co. in writing or verbal?

A. It was in writing.

Q. 87. Who were parties to it, do you remember?

A. The Frankfort and State Line R. R. Co., the Toledo, Cincinnati and St. Louis R. R. Co., the Western Construction Co., and a number of contractors—creditors.

(It is agreed that the contract above referred to, the trust agreement, may be used in evidence at the hearing of the master without being copied into the record of the testimony of the witness, and either party may refer to it at the hearing.)

Q. 88. Do you remember the date of it?
A. March 20, 1883.

Cross-examination:

Questions by F. WINTER, Esq.

Q. 89. There were some amounts subscribed or voted as local aid to this Frankfort and State Line road, were there not?

A. Yes, sir.

99 Q. 90. Do you remember what was the total amount of those local aids or subscriptions, approximately?

A. There was about $90,000.00 of voted aid that I know of and about $15,000.00 of individual subscriptions. There was some aid voted and collected and paid to the contractors; but I had nothing to do with the Frankfort and State Line road. I mean on that portion of the road—the $11\frac{3}{10}$ miles that was constructed before our contract was entered into.

Q. 91. How much of the local aid was received by the Western Construction Company?

A. Probably $40,000.

Q. 92. This $11\frac{3}{10}$ miles that was constructed before your company entered into the contract with the Frankfort and State Line road was paid for by the Frankfort and State Line company, was it not?

A. Partially. They still owed the contractors something like $24,000—between $24,000 and $23,000.

Q. 93. The balance had been paid by the Frankfort and State Line Company in bonds or in local aid?

A. Yes; paid in local aid. What I mean to say is the Frankfort and State Line road paid them for $11\frac{3}{10}$ miles, with

100 the exception of $24,000, which the Western Construction Company paid. They paid for it at the time they made the contract.

Q. 94. The arrangement, then, was that when you took the contract for the Frankfort and State Line Co. you got the benefit of the $11\frac{3}{10}$ miles that had been constructed already, but assumed the payment of the $23,000 or $24,000 that the company still owed on it?

A. Yes, sir; I think you will find it in the contract. R. M. King was the subcontractor to whom the money was due.

Q. 95. How long was this Frankfort and State Line road altogether?

A. I think it was 67 miles.

Q. 96. Was this $11\frac{3}{10}$ miles fully completed?

A. Yes, sir—that is, cars had run over it. There has been work done — it since, and I did some work on it since, before I turned it over to the company.

Q. 97. How for had you progressed with the completion of the Frankfort and State Line road at the time you entered into the contract with the T., C. and St. L. road, which has been put in evidence here as Exhibit B?

101 A. We had not laid any iron at that date, the 9 of June, when the contract was made. We had done a considerable amount of grubbing, clearing, and grading and timber work; got out a good many ties.

Q. 98. Had you been bridgeing any?

A. Some.

Q. 99. And what remained to be done principally was putting the iron down?

A. No; it was not ready for the iron. There was a good deal of work after that to prepare it for the iron.

Q. 100. Was not the reason you abandoned the idea of calling upon the Frankfort and State Line Co. for its bonds that you, upon completion of the Frankfort and State Line road under your contract, would be the holders of the two-thirds of the capital stock of that company, and that you expected to sell the road when it was completed to the T., C. and St. L. road for the best price you could get for it?

A. I think not; no, sir.

Q. 101. You had not entered into any contract with the T., C. and St. L. road at the time you abandoned the idea of calling upon the Frankfort and State Line road for its bonds?

102 A. We were expecting—yes, sir—to execute that contract.

Q. 102. You were expecting to enter into a contract with the T., C. and St. L. road?

A. Yes, sir.

Q. 103. Had you at that time had any understanding or did you arrive at any understanding with the T., C. and St. L. company as to the terms upon which this Frankfort and State Line road was to be turned over to them? Was not this the way of it: You, as president of the Western Construction Company, undertook to build a number of roads which had their local charters extending from, say, Kokomo to East St. Louis? Your contracts with these companies provided, as in case of the Frankfort and State Line Company, that you should have in each case a majority of stock when completed?

A. Yes, sir.

Q. 104. And thus be the owner of the roads virtually?

A. Yes, sir.

Q. 105. Your idea was, then, was it not, that when you had these roads completed, and owned them by virtue of holding the majority of stock in each one, that you would unite them in one road?

A. That is it exactly.

103 Q. 106. And take bonds of the united road for a certain sum that should be agreed upon?

A. Yes, sir.

Q. 107. Without any particular amount being apportioned to any one road?

A. Yes, sir.

Q. 108. And without any reference to the contracts that you had with any of these local roads as to what you should receive from the local roads?

A. Yes, sir.

Q. 109. That was the way of it, was it?

A. Yes, sir.

Q. 110. And that was how you came not to call upon the Frankfort and State Line road for its bonds at all?

A. The more local aid we could get for one of these local companies the greater would be the profits of the construction company.

Q. 111. Was there any particular amount of bonds of the T., C. and St. L. Co. given to you on account of the bonds that were due to you under your contract with the Frankfort and State Line company?

A. I do not know that there was. It would be entitled to its -portionate amount *amount* of the $3,000,000.00, I presume, on a mileage basis.

Q. 112. If that basis was adopted?

104 A. If that basis was adopted; yes. That is the only rule.

Q. 113. That is the rule you adopted in getting the bonds from the T., C. and St. L. Co., according to the mileage of the entire road from East St. Louis to Kokomo?

A. Yes, sir.

Q. 114. And without any reference to what bonds you were to receive under your contracts with the local companies per mile?

A. Yes; without any reference to that.

Q. 115. Was it not the fact that under your contract with these local companies you had different rates per mile of compensation in bonds—some greater rate and some lesser rate?

A. I do not now recollect. That might have occurred, but I do not recollect.

Q. 116. You have no recollection, have you, that you had precisely the same kind of a contract with each road from Kokomo to East St. Louis as to the amount of bonds you were to get for each mile? I mean with local companies. Your contract varied with different companies, did it not?

A. They varied in some particulars. I have not any recollection at all about that, whether it was the same or whether it was different with different companies.

105 Redirect examination by Col. A. W. HENDRICKS:

Q. 117. I observe from reading the two construction contracts in evidence, Exhibits A and B, that the specifications for building the road in Exhibit B are substantially the same as in Exhibit A. Will you state how that came to be so?

A. They were the specifications which had been adopted by the

Toledo, Cincinnati and St. Louis road and the Western Construction Company.

Q. 118. Had it any reference to the specifications in the previous contract made with the Frankfort and State Line?

A. I think you will find substantially the same specification in all contracts that were written by the Western Construction Company—6½-foot ties and 40-pound iron, cuts 16 feet wide at bottom, banks ten feet wide on top, and timbers in bridges 12 by 12, etc.

Q. 119. Was not the contract with the Frankfort and State Line made before the T., C. and St. L. of Indiana came into existence?

A. Yes, sir.

Q. 120. Then I will ask you again if the specifications in
106 the contract with the T., C. and St. L. were intended to follow the specifications in the Frankfort and State Line to adapt the contract to it?

A. Not exactly in that way, but the specifications in both those contracts followed the specifications which had been adopted by the Western Construction Co. and the Toledo, Cincinnati and St. Louis Railroad Company. I do not think that the one followed the other, but it followed the specifications which had been adopted months before that.

Q. 121. It was adopted by the Western Construction Co. itself and followed in all the work it did on this line?

A. Yes, sir; you will find the same specifications in all the local companies in Illinois and in all the contracts that we wrote providing for the strength of the Horne trussed bridges and all the material points.

WILLIAM J. CRAIG.

Since my former examination I have compared Exhibits A and B mentioned in my former evidence with the recorded copies of the contracts in the book mentioned by me and find them to be correct copies from said book. I have made diligent search in my
107 office for the original contracts, of which Exhibits A and B are copies, and cannot find them. The originals of Exhibits A & B, which I last saw in St. Louis about three years ago, are not there now, and I do not know where they are. In April, 1883, the directors of the Frankfort State Line Co. passed a resolution authorizing the pres. and sec'y to make an operating contract with the T., C. and St. L. Co. without specifying terms. The lease was to be made upon such terms as the pres't of the Frankfort and State Line Co. should approve. A lease was prepared, but was never signed. I have written to Mr. Munson, sec'y of Frankfort and State Line Co., about the original of Exhibit A, and he writes that he cannot find it among the papers of that company and can get no trace of it. I have also made search for it among the papers of that Co. and cannot find it.

Cross-examined by Mr. HARRIS:

I found a copy of the unexecuted case aforementioned in the office of the Toledo, Cincinnati and St. Louis when I became receiver. I will send it down to be attached to this deposition as "C."

WILLIAM J. CRAIG.

108 EXHIBIT "A" with dep. of W. J. Craig.

Contract No. 20. Frankfort and State L. Div.

Construction Contract.

Frankfort and State Line Railroad Company.

Memoranda of an agreement made and entered into this 31st day of August, A. D. 1880, by and between the Frankfort and State — Railroad Company, a corporation of the State of Indiana, and the Western Construction Company, a corporation of the State of Ohio.

Whereas the said railroad Co. has been organized to construct and operate a railroad from Frankfort, Clinton county, Indiana, southwesterly to a point on the State line between Indiana and Illinois southwesterly from Eugene, Vermillion county, Ind., and said construction company proposes to build the same and by the necessary proceedings to cause the said road, when so completed, to be made a part of the railroad of the Toledo, Delphos and Burlington Railroad Company, a corporation of the States of Ohio and Indiana:

Now, then, in consideration of the promises of the said Frankfort and State Line Railroad Company hereinafter made the said Western Construction Company hereby promises and agrees to
109 construct for said Frankfort and State Line Railroad Co. a first-class three-foot gauge railroad between Frankfort, Clinton county, Ind., and a point on the State line between Indiana and Illinois nearly southwesterly from Eugene, in the county of Vermillion, State of Indiana, upon the following specifications:

The embankments shall be ten feet wide at the top, the cuts fourteen feet wide at the bottom, and both embankments and cuts shall be the usual and ordinary slope, so that both shall be a first-class job.

The ties shall not be less than 6½ feet long, and be cut from the best timber for ties the county adjacent affords.

The iron shall be of the ordinary T pattern, of usual good, merchantable quality, and weigh forty pounds per lineal yard.

The iron shall be laid with spikes of the usual and ordinary length and size, fastened with fish bars and bolts of the usual ordinary size and length made to fit the rails, and be of usual good, merchantable quality.

Said Western Construction Company also promises and agrees to construct the necessary side tracks, frogs, and switches and
110 the necessary water station and station buildings.

The bridges to be of wood and the ordinary Horne truss pattern to be first-class railroad bridges, and capable of carrying a rolling load of 3,000 pounds per lineal foot.

Said construction company shall within two weeks put an engineering corps at work making the necessary surveys and a permanent location of the road, and shall commence work constructing said railroad within two weeks after the right of way and local aid hereinafter specified have been secured and due notice thereof in

writing has been served by said Frankfort and State Line Railroad Company on the president of said construction company.

The Frankfort and State Line Railroad Company shall secure the necessary right of way on the line as located by the engineer of said Western Construction Company, the width to be given by said engineer, but not to be less than sixty feet wide nor more than 100 feet wide, the title to be free from condition, and shall also secure the necessary depot grounds at the various stations free from condition.

111 Said Frankfort and State Line R. R. Co. shall also prepare and execute and deliver to said Western Construction Co. their first-mortgage bonds at the rate of ten thousand dollars a mile for the entire length of said road, said bonds to be seven per cent. coupon bonds, due in twenty years from date, interest falling due semi-annually, on the first days of January and July each year, beginning Jan. 1st, 1881, and be secured by a first mortgage on all the property of said railroad Co., both real and personal.

The Frankfort and State Line Railroad Company hereby represents that it owes no debt except a debt to one R. N. King and a few small debts incurred in the construction of the road, not exceeding thirteen hundred dollars in all; the said bonds and mortgage to be prepared in the usual and ordinary manner, after the usual form, except that they are to be written or printed instead of engraved, and said mortgage is to be duly recorded.

The said railroad company also agrees to deliver to said Western Construction Company certificates for all the shares of the capital stock of said company, which stock shall be fully paid up and shall be payable as follows: One-fourth when the first fifteen miles

112 from Frankfort is completed; one-fourth when the second section of fifteen miles is completed; one-fourth when the third section of fifteen miles is completed, and the balance when the road is completed to the State line of Illinois and Indiana.

Said Western Construction Company agreeing to deliver therefrom shares of stock to all parties entitled to it, but to have, after satisfying all lawful demands for the company's stock other than its own, two-thirds of all the Co.'s capital stock, even if the same has to be increased.

Said R. R. Co. is now indebted to one Rob't N. King, who is secured by a deposit of certain bonds, local aid, and also all the real estate, rolling stock, and personal property of said company, which debt is now payable, and on the payment of which said King is to deliver up all his security. Now, the said R. R. Co. agree to settle and adjust said claim with said King, and said Western Construction Co. agree to furnish the funds to pay the same and advance the same to said R. R. Co.; and thereupon said R. R. Co. shall forthwith pay said claim, secure the possession of the security now held by King, and put said Western Construction Co. in possession

113 of all the property of said Frankfort and State Line R. R. Co., real, personal, and rolling stock.

Said railroad company agree to raise local-aid subscriptions, either

individual or by the votes of the township through which said R. R. passes, to the amount of four thousand dollars per mile.

If any part of the local aid is raised by subscription of individuals, then only these shall be counted what are given by responsible parties.

Said R. R. Co. agree to secure the right of way for the whole line and also the required local aid complete on or before Nov. 1st, 1880.

Said Western Construction Co. shall prepare said bonds and said mortgage at their own expense, and forthwith, on their being prepared and being presented for execution, said R. R. Co. shall, by its proper officers, execute the same, and said bonds shall be issued under the direction of said Western Construction Co. and shall be payable and deliverable as follows: One-fourth of the entire issue when the first section of fifteen miles out of Frankfort is completed,
one-fourth of the entire issue when the second section of
114 fifteen miles is completed, one-fourth when the third section
of fifteen miles is completed, and the balance of the entire issue when the road is completed to the State line between Indiana and Illinois.

The payments already made on construction shall be considered a part of the subsidy and local aid agreed herein to be raised; and it is further agreed that if the local aid and stock subscription raised in Clinton county shall realize full ninety thousand dollars, then that twenty thousand dollars thereof shall be put in machine shops and grounds at the town of Frankfort, in said county, for the use of said company.

And whereas certain parties have made subscriptions for the bonds of said company, on which certain payments have been made, not exceeding, however, five thousand five hundred and sixty-six dollars, said construction Co. are to adjust the same.

It is further agreed that the stock subscribed by the parties organizing said Frankfort and State Line Railroad Company may be transferred to the said Western Construction Co., said company assuming all liability thereon; and said Western Construction
115 Company agree to accept all such stock so transferred, and assume all liability thereon.

In witness whereof the contracting parties have signed these presents as follows: The Frankfort & State Line Railroad Company has signed these presents by John G. Clark and Samuel Ayers and James L. McMurray, the committee appointed therefor by the board of directors of said company, and also—

And the Western Construction Company has signed the same by W. J. Craig, its president, on this 31st day of August, 1880.

FRANKFORT AND STATE
LINE RAILROAD CO.,
Per JOHN G. CLARK,
SAMUEL AYERS,
J. L. McMURRAY,
Per Committee.
THE WESTERN CONSTRUC-
TION COMPANY,
By W. J. CRAIG, *President.*

EXHIBIT "B" with Dep. of W. J. Craig.

Articles of agreement made and entered into this ninth day of June, one thousand eight hundred and eighty-one, between the Western Construction Company (a corporation created under and existing by virtue of the laws of the State of Ohio), party of the first part, and the Toledo, Cincinnati and St. Louis Railroad Company (a corporation created under and existing by virtue of the laws of the State of Indiana and Illinois), party of the second part.

116

Whereas the party of the first part is created for and engaged in the business of doing and performing each and every thing necessary to obtain, purchase, and procure right of way and land, to lay out, grade, and construct lines of railroad and fully prepare for traffic, as may hereinafter be contracted; and

Whereas the party of the second part being a railroad company and desirous of obtaining the services of said party of the first part in manner and form as hereinafter described:

Therefor- the parties hereto, for value received and in consideration of the mutual promises hereinafter set forth, do hereby agree, promise, and undertake in manner and form as hereinafter set forth:

That, for and in consideration of the payment, hereinafter set forth, to be made by the party of the second part to the party of the first part, the said party of the first part hereby agrees to procure the necessary right of way, land, and material and to perform the necessary work to build a railroad that shall be ready for traffic, and, upon the performance by the said party of the second part of its herein-set-forth undertakings, to put said party of the second part in full, absolute, and perfect possession, thereof, extending from a connection with the Toledo, Delphos and Burlington railroad, in the city of Kokomo, Howard county, in the State of Indiana, and extending thence through the counties of Howard, Clinton, and Tippecanoe, Montgomery, Fountain Park, and Vermillion, in the State of Indiana, and the counties of Vermillion, Edgar, Douglas, Coles, Cumberland, Shelby, Fayette, Montgomery, Bond, Madison, and St. Clair, in the State of Illinois, to the city of East St. Louis, in St. Clair county, in Illinois, being about two hundred seventy miles in length, passing through or near the following towns or cities: Frankfort, Eugene, Indiana, Ridge Farm, Oakland, Charleston, Neoga, and Ramsey, in the State of Illinois.

117

The alignment of said railroad to be at least equal to that of other first-class railroads in counties of similar topographical — geographical formation, running as directly practicable from the city of Kokomo, Indiana, through the counties and places specified, to the city of East St. Louis, Illinois.

The route on which said railroad is to be laid to be selected and located by said second party, subject to protest and arbitration, as hereinafter provided.

118

The gradients are to be in regular planes ascending gradually towards summits, the grades to be, as near as may be best, *to* twenty-six and four-tenths (26.4) feet, and in no event to exceed fifty-two feet to the mile, with such an alignment that an equation of grades and curves shall conform to these conditions.

The party of the first part are to procure and vest in the party of the second part, by a good and indefeasible title, free from conditions and incumbrance a right of way in width thirty feet (30) on each side of the center line of the railroad, save where parties agree to a right of way of less width when the circumstances render the obtaining of so wide a right of way unusual in general railroad custom, the width of right of way being a subject of arbitration as hereinafter provided, which must be cleared of all standing timber.

The parties of the first part are to pay for and are to convey
119 to the party of the second part depot grounds of such size and at such points as second — shall designate, except said first party shall protest, in which case the matter shall be left to arbitration, but in all cases the depot grounds shall be of sufficient size and so located as to enable the company to do the business at the particular stations conveniently and well: Provided, and however, That in towns and vilages where it may become necessary to run the railroad through streets or alleys a narrow right of way (but not less than sixteen feet (16) in width) may be used.

The title must be the best which the municipality and the adjacent owners of land can grant, and free from all conditions or requirements that would interfere with the safe and economical operation of the railroad.

The road-bed shall be ten (10) feet wide on embankments and sixteen (16) feet wide in excavation, with slopes of one and a half to one in embankments and one to one in cuttings.

The grade must be laid high enough to ensure a dry road-bed, and the banks built to provide for shrinkage.

120 The stumps must be cut close, so that in no case will the tops be within one foot of subgrade. All perishable material must be excluded from the embankments, and when the bank is not more than one foot high the stumps and roots must be grubbed out.

The cuts must be properly ditched, and when material is wasted it must be thrown back from the top of the slope at least three (3) feet to prevent its washing back in the road-bed.

All side ditches and barrow pits must be grubbed out and dug with such regular depth and continuity as to afford an uninterrupted flow to the water and prevent its becoming stagnant at any point on the right of way. When the grade is so high that a solid earthern embankment cannot with reasonable diligence be made within the time hereinafter stipulated for the completion of the road trestle-work *work* will be allowed.

Suitable water-ways must be provided when necessary to carry the water across the track; cattle *gaurds* and road crossings put in all such points as may be requisite. When streams are crossed that require a clear span of fifty (50) feet or more Howe truss

121 bridges or some other bridges of similar excellence shall be used, and in all cases the bridges shall be capable of sustaining with safety a rolling stock of three (3,000) thousand pounds to lineal foot in addition to the dead weight. When through bridges are used they shall be fourteen feet (14) between trusses.

All the plans of all the structure must be submitted to and approved by the party of the second part before their erection.

The cross-ties must be of white burr or sweet-oak, made of live timber, free from shakes, dead knots, or other imperfections tending to impair their durability; to be six feet six inches (6′ 6″) long, six (6) thick, and not less than seven (7″) inches wide, hewed or sawed, with two parallel faces, laid three thousand (3,000) to the mile, evenly spaced at right angles to the rails and tamped to a solid bearing.

The track is to be laid with iron rails of approved pattern, made of good merchantable iron weighing forty (40) pounds to the lineal yard, secured at each point by well-fitting fish plates with four bolts of the kind and pattern used in the construction of the Toledo, Delphos and Burlington railroad between Warren and Kokomo,
122 Indiana; four spikes to each tie, to be five inches long and one-half inch square.

The track must be laid with care, surfaced and lined up as the work proceeds, so as not to bend or injure the iron. At all railroad crossings the necessary frogs must be put in of a style and workmanship to be satisfactory to the authorities of the lines which are crossed.

Water-tanks of a capacity of not less than one thousand (1,000) barrels each to be built at such points as the party of the second part may designate, each tank to be covered in so as to be frost proof, furnished with necessary pumping machinery to run it, and connected with an abundant supply of water.

In consideration whereof the party of the second part agrees and promises to pay to the said party of the first part in manner and form as hereinafter provided, to wit:

Three million dollars ($3,000,000) first-mortgage bonds of the Toledo, Cincinnati and St. Louis Railroad Company, par value, and three million ($3,000,000) dollars secured mortgage income bonds of the Toledo, Cincinnati and St. Louis Railroad Company, par
123 value, and four million ($4,000,000) dollars of the capital stock of the Toledo, Cincinnati and St. Louis Railroad Company, par value, the same to be issued and paid in the following manner, to wit:

The party of the second part agrees to at once place upon all its present and to be acquired property, rights, and interests constituting and to constitute its line of railroad running and to be run from the city of Kokomo, Ind'a, to the city of East St. Louis, Illinois, a first lein or mortgage to the amount of three million dollars, said mortgage given to secure the payment of above-mentioned three million dollars of first-mortgage bonds, the said bonds to be three thousand in number and each bond for the sum of one thou-

sand dollars and payable the first day of July, in the year of our Lord one thousand nine hundred and twenty-one—that is to say, to run forty years from their date and to draw interest at the rate of six per centum per annum, payable semi-annually.

Also to place a second lein or mortgage upon the said assets of said party of the second part, securing a like amount of income bonds, dividends on said bonds being payable out of the
124 earnings of the said party of the second part in manner and form as is usual in income bonds, and acceptable to party of the first part, the principal of said income bonds being payable on the first day of July, in the year one thousand nine hundred and twenty-one.

Also to legally issue capital stock to the said amount of four million dollars, par value.

The manner of performance of above-promised payment shall be as follows: Upon the completion by the said party of the first part of a section or sections of the aforesaid railroad line of not less than five miles in length and the acceptance of said completed sections of said railroad line as completed by said party of the second part, said party of the second part will cause to be given, transferred, and delivered unto said party of the first part such *pro rata* proportion or part of said first-mortgage bonds and income bonds so secured and capital stock aforesaid as said completed section or sections bears to the entire length of said to-be-constructed road line, the same being two hundred and seventy miles, more or less, the completion of said entire railroad line entitling said party of the first part to
125 entire amount of above set forth securities.

Also, as further payment for the aforesaid considerations, to assign, turn over, and deliver to the full and perfect use of the party of the first part all local aid of any and every kind received by or promised to party of second part from any source or in any manner.

It is mutually agreed that should the party of the first part use its best efforts in completing its hereinbefore set forth undertaking, and by reason of unfor-seen events not created by or chargeable to it be prevented from so doing within the time specified, then further time shall be granted as shall be agreed upon or determined in case of difference by arbitration.

Should the parties hereto fail to agree in any manner or thing herein contracted about or left to mutual agreement, then in that case each such difference shall be referred to arbitrators, who shall be chosen in the following manner: The party of the first part shall choose a disinterested person as its arbitrator; the party of the second part shall choose another disinterested person as its arbitrator; these two arbitrators shall endeavor to agree upon the ques-
126 tion submitted, and should they fail they two shall choose a third arbitrator. The decision of the two arbitrators without the choice of the third, or the decision of two of the three arbitrators who agree, shall be binding and final on all parties hereto.

In testimony whereof the said parties hereto have caused these

presents to be duly signed, sealed, and executed in manner and form as is legally required.

THE WESTERN CONSTRUCTION COMPANY,
By W. J. CRAIG, *President.*

Attest:
[SEAL.] W. E. HACKEDOM, *Secretary.*

THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. CO.,
By JNO. M. CORSE, *President.*

Attest:
[SEAL.] HERBERT STEWARD, *Secretary.*

127 EXHIBIT "C" with Dep. of W. J. Craig.

Memorandum of agreement made and entered into this — day of ——, A. D. 1882, by and between the Frankfort and State Line Railroad Company, a corporation of the State of Indiana, party of the first part hereto, and the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the State- of Ohio, Indiana, and Illinois, party of the second part hereto, witnesseth:

Whereas railroad companies organized under the laws of the State of Indiana, having connecting roads, are authorized to enter into contracts by which the locomotives and trains of one company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company upon such terms as said companies may agree upon; and

Whereas said party of the first part has not now the means to provide the motive power and cars with which to operate its road; and

Whereas the execution of this contract has been duly authorized by the respective boards *and* directors of the parties hereto:

Now, therefore, said party of the first part, for the period of one year, and thereafter until the board of directors of said party
128 of the first part does otherwise direct, does hereby agree that said party of the second part may run its cars and locomotives, for the transportation of freight and passengers, over and upon the track and road of said party of the first part from Frankfort, Indiana, to the Illinois State line, and for such purposes and the business incident thereto may use and occupy the real estate belonging to said party of the first part: Provided, That said party of the second part shall be liable to their persons for all damages occasioned by such locomotives and trains and hold said party of the first part harmless therefrom.

In consideration whereof said party of the second part hereby agrees to run said locomotives and cars upon all of the road of said party of the first part as soon as the same or any part thereof is ready for traffic and said party of the second part is notified thereof.

In testimony whereof said Frankfort and State Line Railroad Company and said The Toledo, Cincinnati and St. Louis Railroad

Company have hereunto set their names and seals the date above written.

——— ———.
——— ———.

129 OCTOBER 10TH, 1885—9.30 a. m.

W. J. CRAIG recalled and examined on behalf of the Frankfort and State Line Railroad Company, and by agreement of the parties his testimony is to be regarded as though taken in the presence of the master and by him.

Direct examination:

Questions by W. H. CALKINS:

1 —. Mr. Craig, in your testimony, taken on behalf of the complainants in this case, I notice that you give the constituent companies of the T., C. and St. L. as the Frankfort and Kokomo, the Frankfort and State Line R. R., the Tuscola, Charleston and Vincennes R. R., the Charleston, Neaga and St. Louis, and the Vermillion and State Line R. R. You may state whether there was a paper line which formed a part of the T., C. and St. L. line and what its name was.

To which question the complainant objected, for the reason that it being a matter of record is not competent to be shown by parol testimony.

Mr. Calkins, counsel for the State Line road, states he intends to introduce the record evidence, and this is taken assuming the record evidence will be introduced.

A. There was another line, known as the The Toledo, Cincinnati and St. Louis.

2 Q. Were there two lines of that name?

A. Yes, sir.

130 3 Q. State the termini of the two roads of that name.

A. One extended as far west as Kokomo, the other from Kokomo to East St. Louis.

4 Q. As far west from Kokomo from where?

A. From Toledo, with branches running off into Southeastern Ohio.

5 Q. You may now state the branches of the T., C. and St. L. system—all of them—its general system.

A. There were seven mortgaged divisions. One extended from Toledo, Ohio, to Kokomo, Indiana, known as the Toledo Division; the Dayton Division extended from Delphos, Ohio, to Dayton, Ohio; the Dayton Southeastern Division extended from Dayton to Wellston, with branches from Ironton Junction to Ironton; the Iron Railroad Division extended from Dean, Ohio, to Ironton; the Cincinnati Division extended from Lebanon Junction, Ohio, to Dodds, Ohio; the Cincinnati Northern Division from Dodds to the city of Cincinnati; the St. Louis Division extended from Kokomo, Indiana, to East St. Louis, Illinois.

6 Q. Were all these different divisions under process of construction and completion at about the same time?

A. Yes; they were. I never thought of it before, but it is true there was work done on all these divisions during the years
131 1880, 18-1, and 1882. The system was completed in 1882, except the Iron R. R. Division; no work was done on the Iron Railroad Division.

7 Q. I believe you have already stated in your examination that you were president of the Western Construction Company?

A. Yes, sir.

8 Q. And that you constructed the Frankfort and State Line road from Frankfort to the State line as well as that part of the T., C. and St. L. line to East St. Louis. Am I right in this?

A. I did not quite complete the St. Louis Division through to East St. Louis, by reason of a deal we made with the Delphos trust, under which they undertook to complete it and pay the debts, etc.

9 Q. Otherwise the statement is correct, is it?

A. Yes, sir.

10 Q. How familiar were you with the aid voted on the Frankfort and State Line road along its line, and what do you know, if anything, about any local aid and subscription being made to the Frankfort and State Line road, and of any to the T., C. and St. L.?

A. I am familiar with the aid voted and subscribed to assist in the construction of the Frankfort and State Line road, and I
132 know that all of it was made directly to the Frankfort and State Line road. No aid was ever voted or subscribed to the T., C. and St. L.—along that line, I mean.

11 Q. I believe you have already stated in your former testimony that this aid, as well as the subscription, went to the Western Construction Company under its contract for the building of the Frankfort — State Line road. Am I correct in this?

A. In its contract with the Western Construction Company the Frankfort and State Line Railroad Company agreed to raise $4,000 per mile in local aid and to turn the same over as rapidly as it could be collected after the road was completed. The contract will show, I think.

12 Q. Now, will you state whether there was any portion of that road of the Frankfort and State Line completed at the time you made the contract to construct it, and what portion was completed, and the terms relative to the manner in which you were to take the completed portion of it?

To which question the complainant, by Col. A. W. Hendricks, objected, because it is a matter of contract and the facts are shown by the contract, which is already in evidence.

Counsel for the Frankfort and State Line railroad says he
133 will withdraw the question and put it in this shape:

13 Q. What local aid, if any, were you to receive on account of the 11 and $\frac{3}{10}$ths miles of road already constructed between Frankfort and Clark's Hill?

To which question counsel for the complainant objected, for the same reason as to the last question, and also for the reason that it assumes a fact not shown to exist.

A. We were to receive the 11 and $\frac{3}{10}$ths miles already constructed in lieu of a certain amount of local aid.

14 Q. Now, in reference to the Delphos Trust, you spoke of the Delphos Trust having completed a part of the road in Illinois.

A. Yes, sir.

15 Q. You may state whether that contract was in writing.

A. It was not.

16 Q. What, then, were the terms of that contract between the Western Construction Company and the Delphos Trust, so far as it related to the stock of the Frankfort and State Line Railroad Company?

A. In consideration of various miscellaneous securities which were owned by the Western Construction Company, the Delphos Trust assumed all of the unfinished contract work of the
134 Western Construction Company and agreed to build the road and pay the debts of the Western Construction Company. In preparing a list of securities to be turned over by the Western Construction Company the stock of the Frankfort and State Line Railroad Company was reserved, and it was agreed between the directors of the Western Construction Company and the managing committee of the Delphos Trust that said Frankfort and State Line stock should remain in my hands until the Delphos Trust should complete the work and pay all of the construction debt.

17 Q. How did that stock get into the hands of Elmer P. House, if it ever did come into his hands?

A. When the Delphos Trust completed the road to East St. Louis it owed, on account of construction work, about $130,000, which it failed to pay. The contractors to whom that money was due placed mechanics' lien upon the road, and, finally, as an adjustment of the matter and the contract between the T., C. and St. L., the State Line railroad, the American Loan and Trust Company of Boston, and the Western Construction Company and these creditors was made, a copy of which is already in evidence. In pursuance of the
135 terms of that contract or trust agreement I turned over to the American Loan and Trust Company, trustee under the agreement, the 18,000 shares of Frankfort and State Line stock which I have been holding to compel the payment of our debts. After a receiver was appointed for the T., C. and St. L. a proceeding was commenced before Judge Drummond which resulted in an order of the court directing the receiver to issue receiver's certificates to these creditors, and directing also that the 18,000 shares of Frankfort and State Line stock should be returned and held by the receiver until the certificates should be paid. If I am mistaken in this, the order of the court will show. Instead of transferring the stock directly to the receiver, the American Loan and Trust Company transferred it to Elmer P. House and House transferred it to the receiver.

18 Q. What relation did Elmer P. House have to the Delphos Trust at that time?

A. He has been their trustee or man to whom all deeds and transfers to property has been made.

19 Q. When you finished the construction of the Frankfort and State Line railroad you may state whether there was any part of it left incomplete, and whether the T., C. and St. L. afterwards
136 completed it.

A. The T., C. and St. L. never completed any road. My recollection is that before I left the work the Frankfort and State Line road was wholly completed. There certainly was less than a mile of track to lay, and I think it was all laid. I am not quite sure whether the Fall Creek bridge was completed before I left the work. If there was any not completed by the Western Construction Company it was by the Delphos Trust.

20 Q. How about the right of way? Was there any right of way to get and pay for?

A. There were none; but, like there always is on all new railroads, there may have been an occasional piece of right of way to get which may have been cleared up since; but our right of way was unobjectionable and was as complete as the right of way of new railroads generally.

21 Q. State what time Mr. A. A. Thomas became the president of the Frankfort and State Line, and whether he had any connection with the road at the time the 11 and $\frac{3}{10}$ths miles of completed road came into the hands of the Western Construction Company.

137 A. I think Mr. Thomas was elected a director and president of the Frankfort and State Line railroad in the spring of 1882. He was in no way identified with the Frankfort and State Line road or any other railroad at the time the Western Construction Company came into possession of the 11 and $\frac{3}{10}$ths miles of completed road from Frankfort west.

22 Q. Was he president at the time that was fixed up between Gen. Course and the directors of the 11 and $\frac{3}{10}$ths miles of road?

A. He was not. The contract was written by James Irwin, at that time general counsel, and it was long before Mr. Thomas was employed by Gen. Course.

And further the witness saith not.

Whereupon the further examination of the witness was postponed until some other time, and this testimony is not to be used until opportunity is had to cross-examine the said witness.

ALFRED A. THOMAS, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the matters at issue in said cause, deposes as follows:

Direct examination:

Questions by Col. A. W. HENDRICKS:

138 1 Q. Please state your name, residence, and occupation.

A. Alfred A. Thomas; my residence is Dayton, Ohio; I practice law there.

2 Q. Please look at the book I now show you and say what it is.

A. It is the record or book of minutes of the board of directors of the Frankfort and State Line Railroad Company.

3 Q. How do you know that?

A. Since April, 1882, I think, I have been a director in it, and am now, and I was present at its last meeting therein noted.

4 Q. Please refer to 103, being the record of the meeting of the board of directors held on the 30th of August, 1880, and furnish a copy of a resolution passed by the board at that meeting.

A. The resolution referred to is as follows:

"Whereas this company, on the 23rd day of March, 1880, contracted with H. R. Lorne and Company for the construction of its railroad from Frankfort to the State line west, said contract requiring work to commence within ten days from the date of the same, and to overhaul or rebuild that portion of the line from Frankfort to Clark's Hill within 100 days, and to build from Frankfort to the coal-fields in Fountain county, Indiana, by the 1st day of October, 1880; and

139 Whereas no work has been done by said contracting parties west of Frankfort; and

Whereas the Frankfort and Kokomo railroad was represented to us by said H. R. Lorne and Co. as purchased by them or the narrow-gauge syndicate to become a part, together with the Frankfort and State Line railroad, of the continuous line of narrow-gauge road from Toledo St. Louis; and

Whereas since said time we find the Frankfort and Kokomo railroad has passed into the hands of the Lake Erie and Western Railroad Co. by purchase, and is, therefore, now owned and controlled by standard-gauge railroad, with rival interests to the narrow-gauge road we expected under our contract with said H. R. Lorne and Co.:

Therefore it is resolved, That a committee be, and is hereby, appointed to contract with responsible parties for the immediate construction of the Frankfort and State R. R. Said committee shall consist of Samuel Ayers, James S. McMurray, Isaac Porter, and John E. Clark, who are hereby authorized to make and sign said contract for this company, and their so signing shall bind this

140 company the same as if all the members of the board of directors had signed the same. Said committee are hereby authorized to settle with R. R. King, to negotiate for and pay to him such moneys as may be due him, to take possession of the track and material of each and all kinds they may receive from said King, and are hereby authorized to use the same in contracting with parties for the completion of the road, and the officers of the company are hereby directed to sign the same and affix the Co.'s seal to the same.

5 Q. Please refer to page 163 of the same book, being a record of a meeting of the board of directors held on the 20th of April, 1882, and read a resolution offered by Mr. H. Steward and the record of its adoption.

A. The following is the resolution which was passed at that time, as shown by the record:

Resolved by the board of directors of the Frankfort and State Line Railroad Company, That the president and secretary of this company be authorized to execute to the Toledo, Cincinnati and St. Louis R. R. Co. an operating contract and lease of its real estate containing such provisions as said president, by executing, shall approve and adopt; which resolution was unanimously
141 adopted. Date, April 20, 1882. The paper here present, which is marked Exhibit C in Craig's deposition, is either the original or a copy of the paper executed in pursuance of that authority. I wrote it—that is, my recollection is T. A. Phillips, general manager of the T., C. and St. L., signed it, and I signed it on behalf of the Frankfort and State Line road. We agreed to it and carried it out. It was in pursuance of that contract the Frankfort and State Line road was put in possession of the Toledo, Cincinnati and St. Louis Railroad Company long before the receivership and remained in its possession up to the time of its dissolution. At this time the Frankfort and State Line road was practically completed by the Western Construction Company. It was very anxious to turn it over to the T., C. and St. L. railroad to take possession of it and operate it. For quite a time T. A. Phillips, the general manager of the T., C. and St. L., declined to take it. More work was compelled to be done on it to make it in proper shape. At last it was agreed that he would take it. This resolution was passed by the board of directors of the State Line road, and I was directed by the president of the T., C. and St. L. to prepare this contract.
142 My recollection is that it was signed by the general manager of the T., C. and St. L. and myself. At any rate, we agreed on its terms. We agreed on that as the contract, and the State Line railroad was turned over to T. A. Phillips, the general manager of the T., C. and St. Louis, in pursuance of it. Let me add, it remained in his possession, or, rather, its possession, operating the T., C. and St. L., up to the time of the application for the receivership. These facts and this contract were set forth in the bill filed at Chicago, on which the original appointment of a receiver was made. The receiver was Mr. Dwight. Receiver Dwight took possession of the Frankfort and State Line R. R. in pursuance of that order, and he or his successor have since been in possession. I was surprised when I saw Craig's testimony saying that the paper was never signed. My recollection is that it was.

6 Q. Please refer to the same book, beginning at the bottom of the page 197 and continuing on page 198, being a record of a meeting of the board of directors of that company held June 10th, 1884, and read from it a resolution offered by Mr. J. C. Wingate and the record of the adoption of it.

A. I take it. June 10, 1884, is the date of the meeting.

143 Mr. Wingate offered the following resolution:

Resolved by the board of directors of the Frankfort and State Line R. R. Co., That the president and secretary of this company be authorized to execute to the Toledo, Cincinnati and St. Louis R. R. Co. or receiver an operating lease of its real estate and property con-

taining such provisions as such president by executing shall approve and adopt; which resolution was unanimously adopted.

That is a correct copy of the minutes, and that, I think, you will note, is an exact copy of the proceeding. At that time the receiver was in possession. Mr. Craig raised the question as to whether any action was necessary to take at the meeting to continue the receiver's possession, that it might be unquestioned. I said I thought not, and he thought it would be well to pass such a paper, that the signature of the president might settle the question, but it has never been raised, and nothing has ever been done with it.

7 Q. Please refer to page 160 and the following pages of the same book purporting to be a meeting of the board of directors of that company held on the 20th of April, 1882, and read a resolution offered by Mr. Steward, as shown on page 164, and the record of its adoption by the board.

144 A. The minute is as follows:

Resolved, That the president and secretary of this company be hereby authorized to issue to the Western Construction Company, on account of its contract for completing the line of this company's road from Frankfort, Indiana, to the Illinois State Line, two installments of the stock of this Co., amounting in the aggregate to one million dollars of full-paid stock; which resolution was unanimously adopted.

That stock was delivered, but I do not know just when it was delivered.

8 Q. Please refer to the same book, on page 169, being the record of a meeting of the board of directors of that company held on the 29th day of March, 1883, and read the resolution found on that page.

A. The resolution is as follows:

The following resolution was offered and adopted:

Resolved, That there be issued forthwith to the Western Construction Company all of the stock due under its contract for the building of this company's road, less the sum of two hundred thousand dollars thereof, par value, reserved for issues to tax and local aid, and that the president of this company be authorized to sign on its behalf the agreement this day made between the T., C. and St. L. R. R. Co. (Toledo, Cincinnati and St. Louis Railroad Com-

145 pany), *to* the Western Construction Co. *et al.*, the American Loan and Trust Co., and others.

9 Q. Was the stock referred to in that resolution issued?

A. The stock book will show. My recollection is that the stock mentioned in the resolution last read and referred to was not then issued; that this last resolution authorizes the execution by the president of this company on its behalf—that is, of the State Line Co.—of what I call the trust agreement. That trust agreement authorized the issue, not of one million, as I recollect, but of the balance, I think, $4,800,000—a larger amount than the first. My recol-

lection is that one delivery was made which covered all that is provided by both of the last two resolutions.

10 Q. Please refer to the paper now shown you, being Exhibit No. 2, with the master's report on the intervening petition of Henry McPherson in the suit of Grenville D. Braman *vs.* The T., C. and St. L. Railroad Co., No. 672, filed Aug. 29, 1884, and state whether that is a copy of the agreement referred to in the latter part of this resolution.

A. Yes, sir; I understand this to be a correct copy. It is the trust agreement referred to in the latter part of that
146 resolution. This trust agreement, it will be noted, is signed by T., C. & St. L. R. R. Co., by the American Loan and Trust Co., by the Western Construction Co., by the Frankfort and State Line Railroad Co., as well as various creditors. I wrote that contract and suggested it and got everybody to agree to it.

(This agreement is marked Exhibit No. 1 of the deposition of this witness, Mr. Thomas.)

11 Q. Please refer to the same book, beginning on page 199 and extending on to page 200, purporting to be a record of the proceedings of the stockholders' meeting of that company April 20, 1885, and read that portion of it relating to the ascertainment who the stockholders of the company then were.

A. It is as follows: It was moved that the chair appoint a committee of three to report the names of stockholders and the number of shares they were entitled to hold; motion carried. The chair appointed Eli Martin, John J. Bayless, and Elwood Avery. Said committee then reported the following persons as stockholders, holding the following number of shares:

A. A. Thomas	1 share.
W. J. Craig, receiver	18,000 shares.
147 W. J. Craig, president W. Con. C.	316 shares.
M. Epstein	1 share.
S. O. Bayless	1 share.
John C. Wingate	1 share.
James R. Rice	1 share.
W. H. Hart	1 share.

12 Q. You have said that for a considerable period of time you were a director of the Frankfort and State Line Railroad Co. Please state what other, if any, official relation you have had to that company.

A. I was its president during the time most of the papers read here were passed. I was its attorney in many matters. I believe I am vice-president now; I am not sure.

13 Q. Have you had any connection with the line of road now known as the Toledo, Cincinnati and St. Louis road?

A. Yes, sir; I was its general attorney from its first organization, through all its consolidations, up to the time of the receivership.

14 Q. By whom were you employed?

A. I was attorney for the receiver up to last fall. In March, 1881,

I was employed by Gen. Corse to organize the first T., C. and St. Louis railroad. He was then president of the T., D. and B. R. R.
He stated to me what the plan was of the railroad of the
148 Western Construction Co. and of the parties who were expected to raise the funds. He said the T., D. and B. R. R. Co. then extended from Toledo to Kokomo; that its mortgage was executed and could not be changed; that its road was practically completed, except from Warren west to Kokomo, and that that was under construction contracts. He said that a subscription had been offered of three million dollars for a three-million-dollar mortgage from Kokomo to St. Louis covering the railroad, and that upwards of one-third, or one million dollars, of such bonds had been sold; that what he wanted was to get the railroad as quick as might be, and he wanted me to take charge of the legal work for him. He explained to me the plan by which they proposed to proceed and by which they did proceed. He said he wanted the road known as the T., C. and St. L. to be incorporated immediately in Indiana; that then they would buy one or two existing roads, or had bought them, and that of one or two newly organized roads they would procure the right of way, as the road would be so constructed under contracts between the Western Construction Co. and these, which he termed constituent roads. He explained to me that further west, in Illinois,
149 lay one, on the east half of Illinois was another, that the Frankfort and State Line was another, the Frankfort and Kokomo R. R. was another, and that the thing to be done was to effect a corporate organization, and by consolidation, as quickly as may be, get a line and build up a road beneath the mortgage. This was carried out to the end. As each constituent company would be consolidated in, it would in the consolidation proceeding ratify the existing mortgage, except that the Frankfort and State Line road was never consolidated. It was delayed and postponed, because its consolidation would cancel the right to collect the tax. This tax was not its property, but was contracted as part of the construction price to the Western Construction Co. The first thing that was done was the incorporation of the T., C. and St. L. Railroad Co. in Indiana; next it was consolidated with the Frankfort and Kokomo R. R.; next the Vermillion and State Line R. R. Co. of Illinois was chartered. It was consolidated with these Indiana roads. Next the two railroads of Illinois were consolidated and made a T., C. and St. L., which was known as the T., C. and St. L. of Illinois.
150 The mortgage was executed from Kokomo to St. Louis. At the time it was executed there was no right of way procured or standing in the name of the T., C. and St. L., though it owned the road and had then acquired the consolidation from Kokomo to Frankfort. This was the plan, and what was done under this plan was done with the knowledge of all parties, by the consent and direction of all parties, to me and others. By all parties I mean the contracting bodies of these constituent companies and of the T., D. and B. and of its successor, the T., C. and St. L. Mr. Craig was president of the Western Construction Co. and Gen. Corse of the railroad. What had been done in the State Line railroad affairs

prior to my time I had no part in and know of from others only. Then—that is, in March, 1881, or when this mortgage was laid practically, or, more strictly speaking, up to the time of its contract with the Western Construction Co.—it had about a dozen miles built, almost wholly from taxes, some from local donations or subscriptions. It was shabby and worthless and practically abandoned. In that shape Gen. Corse came along, said what I have stated,
151 and the parties who were then representing the State Line R. R. were called in and discussed it; all of which matters ended in the contract between the Frankfort and State Line R. R. and the Western Construction Co. That contract appears on the minutes of the Frankfort and State Line R. R. Co. and speaks for itself. No; that is not strictly correct. There is nothing on the minutes except the authority to execute it. It appears on the minutes, I am very sure, of the Western Construction Co. At any rate, when I first went to Frankfort, Mr. Craig handed me the original contract, which was always acted on, and which was signed, on behalf of the State Line R. R. Co., by its committee authorized by that resolution. The contract shows that this entitled the railroad Co., for its construction in accordance with the terms of that contract, to all its donations and local aid or tax; also to all its stock, except what was needed and had to be paid out directly for subscriptions, donations, or tax—that exact amount has never yet been adjusted; also to the mortgage, as I recollect—the first mortgage of ten thousand dollars a mile on the road to be built. The contracts of the Western Construction Co. with these other constituent
152 companies so called contain substantially the same provisions. Gen. Corse and Mr. Craig both explained to me that it was impracticable to dispose of bonds secured by mortgages on sections of a road; that therefore none would be called or issued. None ever were called for west of Kokomo. What donations for right of way could be procured were procured, and what other aid, as they called it, was due to the State Line and the others. They did differently in these respects in Indiana, but aside from this the road was constructed and paid for by money received from the sale of the T., C. and St. L. mortgage from Kokomo to St. Louis.

15. Q. Is that the mortgage now in suit?

Ans. It is the mortgage now in suit in this case, as I understand. I had this fact as a fact so often from so many persons connected with the matter that it is pretty hard to specify just who. It was constantly under discussion. I had it from Geo. W. Balloo and Gen. Corse and others connected with the business that were in a position to know. The railroad, not the State Line—the T., D. and B., and the T., C., and St. L. Co.—constituted Geo. Wm. Balloo & Co., I think, or Balloo, its fiscal agent. He always was such. The Western Construction Co. constituted him its fiscal agent. The
153 mortgage bonds when executed were sent to New York. All except a small portion, as I understand, were delivered to Balloo and Co. as fiscal agents. The larger part were by them sold for money, the proceeds put to the credit of the Western Construction Co. in his office in New York. Mr. Craig had his offices in Frank-

fort and afterwards at St. Louis. When estimates would come in and money be needed drafts would be made on Balloo for money, and the money was so paid, and that built the Frankfort and State Line railroad. It should be known that the Western Construction Co. had a number of like contracts for other portions of the narrow-gauge road southeast in Ohio and some in Indiana.

All or nearly all of these railroad bonds were so sold, and I suppose, I have understood—whether from Belloo or whom I cannot now state—that the money was kept in one fund, so that when drafts would be made by Craig as president of the construction Co. for work on the Frankfort and State Line road they would be paid by moneys then in Balloo's hands to the credit of the construction Co. But into that pot he put the proceeds of the sale of the T., C. and St. L. mortgage. A portion of these mortgage bonds had
154 not been sold when the Western Construction Co. practically failed. It was unable to sell the balance and raise cash to pay Craig's drafts and contracts. It entered into the agreement with what was known as the Delphos Trust, by which the Western Construction Co. sold to the Delphos Trust the balance remaining in its hands unsold of the T., C. and St. L. mortgage bonds, and the Delphos Trust agreed to accept its contracts, including the contract to finish the State Line road, which was not then finished, and the portions of the road west and others. The Delphos Trust did complete the road and so sold or divided the mortgage bonds.

16 Q. Had you anything to do with the getting up of the mortgage of July 23, 1881, being the mortgage now in foreclosure?

A. I wrote it and was present at all the meetings wherein it was authorized or ratified.

17 Q. As to that part of the railroad mortgage lying between Frankfort and the State Line, what piece of road was intended by the parties to that mortgage to be covered by it?

A. It never was the intention of the T., C. and St. L. R. R.,
155 as evidenced by all its acts, so far as my knowledge went and all the declarations and instructions of its officers to me, to build any other road from Frankfort to the Illinois line except what is known as the Frankfort and State Line, nor was it ever the expectation or intention of the Frankfort and State Line R. R. Co., after I became acquainted with and connected with —, that any other line should so be built between its terminal. Let me specify as to this. Perhaps it was in the spring of 1882—the records will show—the Frankfort and State Line old board of directors—the same or substantially the same who were such when its contract with the Western Construction Co. was made—met in Frankfort for the purpose of turning the road over to Gen. Corse, then president of the T., C. and St. L. They figured up what indebtedness they had on old scores and stated it, and he paid it. The president of the Frankfort and State Line, with, I think, the entire board of directors, or the entire board who attended the meeting, called on Gen. Corse and had a full talk at Frankfort, and stated that they were ready that he should take possession practically and name whatever
156 board of directors he wished to be chosen. He did so, and that was the new board that organized when I went in.

(By A. C. HARRIS:)

18 Q. Were you there at that conversation you speak of?

A. Yes; I was there all through it. When the new board met I practically began my work with the Frankfort and State Line. My recollection is that at that meeting I was elected president of the Frankfort and State Line executive committee and continued so until some meeting was wanted, and I was too engrossed in business to go then, and they elected Mr. Rice and elected me vice-president. Neither the Western Construction Co. nor anybody ever asked for the mortgage from the State Line R. R. which it had agreed to give for its construction. The Western Construction Co., in fact, caused the T., C. and St. L. mortgage from St. Louis, Frankfort to Kokomo, to be executed, and they accepted it in lieu of the other, intending and expecting at that time by consolidation to ratify.

(By Col. A. W. HENDRICKS:)

19 Q. Can you state whether or not the fact of the execution of this mortgage of July 23, 1881, on the T., C. and St. L. was known to the other directors of the Frankfort and State Line road
157 as well as yourself, and whether it was known to them that the funds with which the roads was built were delivered from the sale of the T., C. and St. L. bonds secured by that mortgage?

A. I cannot say with certainty as to every particular person, though I have no reason to doubt it. It was known to all the officers of the State Line road under discussion before us many a time. It was known to the president who preceeded me—Mr. Morrison. It was on record in the county, each county through which the State Line goes, in the recorder's office. It was known to everybody who took any pains to be informed of anything at all about how the road was built. James H. Rice, now president of the State Line R. R. Co., was in the employ of the Western Construction Co. during all this time—was the confidential man—and W. J. Craig was the president of it and knew more about it than I did. He was the right of way agent, the man on whose ability and everything else Craig most relied in all the matters in the construction of the road.

This one fact I would like to say here in explaining mat-
158 ters: I think it is only fair to the railroad to say, from the time the Frankfort and State Line R. R. was put into possession of the T., C. and St. L., the T., C. and St. L. kept it up at its own expense and paid the balance of the construction bills, paid the right of way debts, procured additional right of way, built fencing, and all other expenses of the new road; paid for the right of way railroad fence, and took the right of way and name of the T., C. and St. L. It treated it as if it were its own property, so far as carrying the expense was concerned.

Another matter, as explaining this trust agreement: The contracts for the building of the road that was unpaid for, which that trust agreement was designed to take care of and prevent suits on, were let, covering parts of the Illinois road and parts of the State Line,

Indiana, road. One contract went right across the line. I understood that this Frankfort and State Line stock was already in trust for purposes of consolidation at the time of the execution of this trust agreement, and that that trust was transferred to Elmer P. Horne, though the trust agreement does not fully specify. It assumes it.

159 I want to say, of my own motion, one other matter: That I have no interest in this matter, either in the railroad or any of its constituent companies, or any of its securities, or in the Western Construction Co. I own, of course, a nominal amount of stock in the State Line road—enough to fully authorize me to hold an official position. The record shows nobody else holding any more, of the officers and directors of the road, excepting the one belonging to it.

Cross-examination:

Questions by F. WINTER, Esq'r.

20 Q. You were elected president, I believe, as the record shows, at a meeting held the 20th April, 1882, contained upon pages 158 and 159 of the record of the proceedings of the stockholders and directors of the Frankfort and State Line road?

A. The records show, I think, that is right. (Referring to said record.) The minutes show that I was elected April, 1882. I take this to be correct.

21 Q. It shows the fact also that you were president at the time the resolution was offered and passed directing the president
160 and secretary of the company to execute the operating contract to the Toledo, Cincinnati and St. Louis R. R. Co. which has been referred to in your testimony heretofore?

A. Yes, sir.

22 Q. Have you any personal knowledge that the money with which the Frankfort and State Line road was built was the proceeds of the bonds of the T., C. and St. L. railroad procured by the mortgage in suit?

A. I only know what I have been told by Mr. Balloo and Gen. Corse. The matter and the situation of this State Line railroad has been under discussion with me hundreds of times by them and their successors. I had that fact from them. I did not sell the bonds nor handle the money.

23 Q. The only knowledge you had on that subject was from conversations you had with Gen. Corse and Mr. Balloo and their successors?

A. Yes, sir; their assistants and successors; among others, the treasurer of the Western Construction Co., Mr. Remington, of New York. There was no possible way other to raise money than that. Part of the State Line road was very costly. The costly part was the part the Western Construction Co. built. The only cheap part is the part that has been done since.

By Col. HENDRICKS:

24 Q. I suppose you know that the Frankfort and State Line Co. itself did not furnish the money?

A. It has had no money at all except what was given to it,
161 and that was very small sums. The Western Construction Co.'s books, I understand, have been kept at Balloo's bank. They were accessible. The drafts and amounts and the persons those drafts went to are all on record.

By A. C. HARRIS:

25 Q. Do you know where they are?

A. No. They went into Mr. Balloo's possession at the time of the organization of the Delphos Trust. You must understand that while the old minutes of the State Line board were shabbily kept the expenditure of the money of the Western Construction Co. by Mr. Craig were very fully kept. Very accurate book-keeping, indexing, and dating, and, as I understand, the receipting of drafts showing how and where the money went, was all kept there; one set kept by Mr. Craig and another by the treasurer of the construction Co. of New York, and they were as correct as a bank keeps its accounts.

ALFRED A. THOMAS.

The deposition of James H. Rice to be used in a case now pending in the United States circuit court, wherein —— Larnerd is plaintiff and the T., C. and St. L. R. R. Co. is defendant.

This deposition is taken by agreement between the parties, and shall have the same effect as if taken in the presence of the master.

The said JAMES H. RICE, being first duly — to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination:

Questions by W. H. CALKINS.

1 Q. You may state your name and residence, and what connection you have with the Frankfort & State Line Railroad Company at present.

162 A. My name is James H. Rice. I reside at Indianapolis, and am president of the Frankfort and State Line R. R. Co.

2 Q. When were you elected president of that Co., and what was your connection with it before you were president?

A. I was elected president last April a year ago, and prior to that time I was secretary two terms; I think, I am not positive, one term at least.

3 Q. What connection did you have with it at the time it was constructed?

A. I was elected secretary shortly after I went to Frankfort. That was in 1881, and I had charge of the right of way matters and general business.

4 Q. You may state what connection, if any, you had in the pro-

curement of rights of way for the railroad from Frankfort to the State line.

A. I had charge of what was known as the right of way department. I employed all the men in that business, and adjusted the claims passed on.

5 Q. You may state whether the Frankfort and State Line R. R. Co. had completed the procuring of its right of way from one end of the line to the other prior to the time that the T., C. and St. L. Co. took possession of it; and if the rights of way had been procured you may state by whom and in whose name they were so procured.

A. Well, all the rights of way had been procured prior to our going there and settled for from Frankfort to Clark's Hill, and prior to the lease of the Frankfort and State Line to the T.,
163 C. and St. L. Company we had secured all the rights of way that there was not litigated in the name of the Frankfort and State Line Co., with the exception of some two or three peices—possibly a strip in Montgomery Co., and some litigated peices belonging to heirs in Fountain Co. It was taken in the name of the Frankfort and State Line Company.

6 Q. The litigated peices that you speak of were being litigated between whom?

A. Between the property—the property-holders—and the Frankfort and State Line Co.

7 Q. What was the width of the two peices in Montgomery Co. that had not been secured?

A. Well, there was one peice, a very small strip—I think it was a very narrow strip—the Frankfort and State Line people got permission to construct over it. That was one peice. Then there was a peice near the depot where we had to have an additional strip that we had gotten over. The engineers had swung the location of the grade to one side, and it was necessary that we should get an additional strip. But, since I think of it, there is a strip in Fountain Co. also.

8 Q. I desire to get about the entire width or length of the road over these unsettled peices.

A. Well, I cannot tell without consulting the notes. The right of way was different at different locations. That depends on the fin or cut. I do not think the whole thing would exceed one-half mile in the different places. The narrow strip in Fountain
164 Co. was across a two-acre lot or tract, and the peice in Montgomery Co. was across the two forties.

(By A. W. HENDRICKS:)

9 Q. When you say one-half mile you mean in all over the whole line?

A. In all; yes, sir. The longest strip was in Montgomery county, which had been settled in the courts partly at that time.

(Questions by W. H. CALKINS, continuing:)

10 Q. Now, Col., will you please state what funds were used in the

purchase of this right of way; whether the stock of the company entered into it; and, if so, to what extent?

A. Well, there was a great deal of it gotten by what we call "donated." In Montgomery county a man named Wingate that I had employed secured what we call a clean right of way, and it cost the company scarcely anything. We paid him his salary, and outside of litigation it was comparatively nothing. There was in the neighborhood of thirty miles that was the cheapest right of way ever gotten in Indiana, I think.

11 Q. And as to the rest?

A. Well, the rest had been secured—from Frankfort to Clark's Hill had been secured and built on.

12 Q. That was the 11 and $\frac{3}{10}$ths miles?

A. Yes, sir; on that part the iron was down and the road completed.

13 Q. And from Montgomery county east was it donated?

165 A. Yes, sir; and at Clark's Hill the property there was owned principally by one man named Clark, and he took all these contracts for the heirs, and they contained conditions about fencing and everything being completed, when they should be turned over to the State Line Co. That was all done prior to my going there. I do not know anything about that. I know simply that they were turned over to us, and we gave stock of the company for them, and some were paid by money.

14 Q. And money paid by whom?

A. I paid the money.

15 Q. Representing whom?

A. The Western Construction Company.

16 Q. So far as you know, did the T., C. and St. L. Co. make any payments at any time before the road was leased to it, as you have before spoken?

A. Well, when we got that right of way there was not any to pay for.

(Questions by F. W. WINTERS:)

17 Q. There were no rights of way to get?

A. As far as I know, none.

18 Q. Had you taken deeds for all these rights of way?

A. Yes, sir; all of that right of way was in deeds. I remember very distinctly we had a peculiar form of deed. You would call it a right of way.

Cross-examination:

Questions by A. W. HENDRICKS.

166 19 Q. You say at the time these rights of way were taken by you there was no T., C. and St. L. Co.?

A. No, sir. Well, I think there was a T., C. and St. L. Co. before we completed that road in Indiana.

20 Q. What were the proposed connections that you intended to make?

A. On the east with Frankfort and Kokomo, and on the Illinois side with the Vermillion and State Line on the other side.

21 Q. What important points was it proposed to connect by the system of road that you had in view?

A. Toledo and St. Louis.

22 Q. You were placing this road then with reference to the contemplated connection at that time as part of the narrow-gauge system?

A. Oh, certainly.

23 Q. What was your relation to the Western Construction Company?

A. I was a member of it—a stockholder in the Western Construction Company.

24 Q. And in getting all these rights of way you were acting for it, and not as an officer of the Frankfort and State Line, I suppose?

A. I was acting in a general capacity, I suppose. I was hired on the Frankfort and State Line.

25 Q. Was that before or subsequent?

A. When we went there the Western Construction Company had a contract to build that road.

26 Q. So you remember, under the contract, who was to furnish the right of way?

A. The Western Construction Company.

167 27 Q. How came the railroad to do it when the Western Construction Company was bound to furnish the right of way?

A. Well, I don't know, for it seemed to be in a general transfer before building the road.

Redirect examination:

Questions by W. H. CALKINS.

28 Q. You may state what the general equipments of the Frankfort and State Line railroad was when it was taken possession of under this lease by the T., C. and St. L. Co.

A. It consisted of one locomotive that had been run over the ten miles completed, and three or four flat cars—construction cars—and several hand-pushed cars and some tools.

29 Q. Where is the engine now?

A. Well, I know that only on information—only what the boys tell me—it is running on the road. I have not seen it.

Recross-examination:

Questions by A. W. HENDRICKS.

30 Q. Was that engine and other equipments that you speak of taken in possession by the T., C. and St. L. Co. at the time it took possession?

A. Yes, sir; everything went together.

31 Q. All went as one concern?

A. Yes, sir.

168 32 Q. Do you remember when it was taken?

A. No. Shortly after. I think it was soon after the track was narrowed from Frankfort to Kokomo. We ran over the entire line with it whenever we had any construction to do. As soon as they narrowed that line they used that in fixing bridges there and going west as far as the river.

33 Q. You had a contract subsequent to the Frankfort and State Line with the T., C. and St. L., had you not—that is, the Western Construction Company?

A. Yes, sir; the Western Construction Co. had.

34 Q. Was this road turned over to the T., C. and St. L. after or before you went into that contract?

A. We did not turn over the road, we leased it.

35 Q. Was that done before or after you had made your contract with the T., C. and St. L. Co., and after the road was constructed from Kokomo to East St. Louis?

A. That was afterwards. We leased it afterwards.

169 *Articles of Association of The Toledo, Cincinnati and St. Louis Railroad Company.*

We, the undersigned, for the purpose of forming a corporation to build, complete, own, maintain, and operate a railroad to extend from a point on the dividing line between the States of Indiana and Ohio, in Adams county, Indiana, to a point on the dividing line between the States of Indiana and Illinois, in Vermillion county, Indiana, and to connect with or become coterminous with railroads now built or being built or to be hereafter built in the said State of Ohio, and running to and terminating at the city of Toledo, Ohio, and also to extend to and form a continuous line of railroad to East St. Louis, on the Mississippi river, in the State of Illinois, do hereby, under the general laws of the State of Indiana, adopt the following articles of association:

Article I.

The name of this corporation shall be The Toledo, Cincinnati and St. Louis Railroad Co.

Article II.

The capital stock of this company shall be three million dollars ($3,000,000).

Article III.

170 The capital stock shall be divided into sixty thousand shares of fifty dollars each.

Article 4.

The number of directors shall be seven.

Article 5.

The names of the directors for the ensuing year shall be: Geo. Wm. Balloo, Eli Marvin, C. H. Vennor, W. J. Craig, Jno. M. Corse, W. H. Hart, Wm. H. Bingham.

Article 6.

The name of the place from which said road is to be constructed is Kokomo, Howard county, Indiana, through Ind., to St. Louis, Mo., crossing the boundary line between the States of Indiana and Illinois at a point in ——, Vermillion county, Indiana.

Article 7.

The termini of said road are: First, a point on the eastern boundary of Adams county, Indiana, where the route of the Toledo, Delphos and Burlington road intersects the State line; and, second, a point in the western boundary of Vermillion county, Indiana, where the route of the Frankfort and State Line railroad intersects the State line and East St. Louis, Ill.

Article 8.

The length of said line of road is approximately one hundred and seventy-five miles in the State of Indiana.

171 And we hereby, for the purposes set forth above, agree to subscribe for and take the number of shares set opposite our respective names, and pay for the same in such manner as may be ordered by the board of directors, subject to the laws of Indiana.

Name.	Residence.	No. of shares.	Amount.
C. H. Vennor	Boston	20	1,000
Edward Cross	Chicago	20	1,000
Eli Marvin	Frankfort, Ind.	20	1,000
W. H. Bingham	New York	20	1,000
D. H. Darling	Boston, Mass.	20	1,000
W. H. Hart	Frankfort, Ind.	20	1,000
Geo. E. Beatty	Boston, Mass.	20	1,000
H. H. Remington	New York city	20	1,000
W. R. Bingham	"	20	1,000
Herbert Steward	New York	20	1,000
Jas. H. Rice	New Albany, Ind.	20	1,000
J. C. Wingate	Crawfordsville, Ind'a	20	1,000
W. J. Craig	Bluffton, Indiana	20	1,000
John Corse	New York	370	18,500
Geo. W. Balloo	do.	370	18,500
Total		1,000	50,000

Box 651.
Paper 23.
Articles of association of the Toledo, Cincinnati and St. Louis Railroad Company.
Filed February 12, 1881.

E. R. HAMN, *Sec. State.*

172 Memorandum of agreement made and entered into this 4th day of October, A. D. 1881, by and between The Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation organized and existing under the laws of the State of Illinois, party of the second part, witnesseth:

Whereas, by the laws of the State of Indiana, any railroad company organized under the laws of said State has power to join, intersect, and unite its railroad with any other railroad constructed or in process of construction in any adjoining State at such point as may be mutually agreed on by said companies and the two railroads thus connected upon such terms as may be by them mutually agreed upon in accordance with the laws of said State, provided their charters authorize said roads to go to said State line or the point of intersection; and

Whereas, by the laws of the State of Illinois, any corporation existing or organized by virtue of any general law of said State may consolidate the stock, property, and franchises of said Co. with any other like corporation; and

173 Whereas said The Toledo, Cincinnati and St. Louis Railroad Company, party of the first part, is a corporation duly organized under the law of the States of Indiana and Illinois, by consolidation heretofore duly had and made by and between a company of the same name and the Vermillion and State Line R. R. Company for the purpose of locating, constructing, and operating a railroad extending from the dividing line between the States of Ohio and Indiana, in Adams county, Indiana, where the Toledo, Delphos and Burlington railroad intersects said State line; thence through the counties of Adams, Wells, Huntington, Grant, Howard, Clinton, Tippecanoe, Montgomery, Fountain, Vermillion, and Park, in said State of Indiana; thence through the county of Vermillion, in the State of Illinois, to a point on the south line of said county near the crossing of said line by the Danville and Southwestern railroad, making a continuous line of railroad between said termini, and for the further purpose and with the power of acquiring by consolidation and amalgamation said party of the second part and its line of railroad extending from Vermillion county to East St. Louis, thus making a continuous line of railroad to East St.

174 Louis, Illinois; and

Whereas said, The Toledo, Cincinnati and St. Louis Railroad Company, party of the second part, is a corporation duly organized and existing under the laws of the State of Illinois, by virtue of a consolidation heretofore duly had and made by and between the Tuscola, Charlestown and Vincennes Railroad Company and the Charlestown, Neoga and St. Louis Railroad Company for the purpose of constructing, locating, and operating, and having power to construct, locate, and operate, a railroad extending from a point on the State line of Indiana and Illinois, in Vermillion county, Illinois, where the Frankfort and State Line railroad intersects said State line, extending thence through the counties of Vermillion,

Edgar, Douglas, Coles, Cumberland, Shelby, Fayette, Bond, Montgomery, Madison, and St. Clair to the city of East St. Louis, in said State of Illinois, all of which of said lines of railroads of said parties hereto are now built or in process of construction; and

Whereas the lines of railroad owned by said corporations, parties hereto, are not parallel or competing, and said corporations are of the same kind, engaged in the same general business, and
175 carrying on their business in the same vicinity; and

Whereas the several boards of directors of said corporations, parties hereto, respectively, did desire and resolve to consolidate the said corporations, forming one company, all as hereinafter set forth, and did call special, separate meetings of the stockholders of said corporations, parties hereto, respectively, for the purpose of submitting to a vote of such stockholders a question of such consolidation, of which meeting and of the time and place and object thereof general notice was duly previously given by said respective boards of directors, by publication for more than sixty days and for nine successive weeks and personal notice to each stockholder, all as required by law; and

Whereas at each of said respective meetings of stockholders so regularly called a vote of more than two-thirds in amount of the corporate stock and two-thirds of all the votes represented by the whole stock of each of said respective corporations, parties hereto, was cast in favor of such consolidation and the adoption of these articles, and the same were duly adopted by each of said constituent companies; and

176 Whereas said party of the first part, after it had acquired the said line of railroad of the said party of the second part, and while the corporation of said second party hereto was in process — consolidation and amalgamation by said party of the first part, with the approval and sanction of its stockholders duly had and given, did, with the consent and authority of the board of directors and stockholders of said party of the second part previously given for the purpose of constructing, completing, improving, and operating said line of railroad from Kokomo, Indiana, to East St. Louis, Illinois, issue and negotiate three thousand (3,000) six per cent. first-mortgage bonds, each for one thousand dollars, and three thousand five hundred (3,500) six per cent. second mortgage or income bonds of said company, twenty-five hundred thereof for the sum of one thousand dollars each and one thousand thereof for the sum of five hundred dollars each, and secure the same by first and second mortgage on all the property, franchises, and income of said parties of the first and second part, including said line of railroad from the Indiana State line to East St. Louis, which said bonds and mortgages are particularly set forth and described in the indenture of date July 23rd, 1881, recorded in Coles county deed rec-
177 cords, volume —, page —, to which reference is made, and also by a mortgage supplemental thereto of date August 17th, 1881, recorded in Montgomery county, Illinois, deed records, volume —, page —, to which reference is made, and with the proceeds of which securities the railroad of said party of the second

part is now being built; and whereas at such said special meeting of the stockholders of said party of the second part called by the directors thereof for that purpose and held on the fourth day of October, 1871, sixty days' notice of which, served personally or by mail and publication, all as required by law, was duly given to each of said stockholders, and notice stating the time and place of said meeting, the object thereof, and the amounts of said several liens, the holders of more than two-thirds in amount of the stock of the said corporation, party of the second part, concurred in and ratified the issue of said bonds and execution of said mortgages, and ordered such concurrence and ratification to be expressed in and made a condition of this consolidation:

Now, this agreement witnesseth:

That the said parties hereto above mentioned and described, in consideration of the premises and of the mutual covenants
178 and agreements herein set forth and of divers other good causes and considerations them thereunto moving, pursuant to the powers in them vested by and under the laws of the States of Indiana and Illinois, and upon and with the direction and assent of the holders of more than two-thirds of the whole of the capital stock of each of said constituent companies, have joined and united, and by these presents do join and unite, their said railroads at said point of intersection and connection, and have merged and consolidated, and by these presents do hereby this day merge and consolidate, all and singular their capital stock, property, and franchises, forming one corporation and joint stock company of the two railroads and companies thus united, upon the terms and conditions following, which are hereby mutually agreed upon—that is to say:

Article 1.

The name of the consolidated company shall be the Toledo, Cincinnati and St. Louis Railroad Co.

Article 2.

The line of railroad of this consolidated company shall be the line of the said party of the first part, so far as the same extends, together with such additions to and extensions of said line as may be
179 desirable and authorized by law, together with power in said consolidated company to hereafter make such consolidations with other railroad companies as may at any time be authorized by law and promote the mutual benefit of the public and this consolidated company.

Article 3.

The place at which shall be established and maintained the principal business office of this consolidated corporation is the city of Charleston, Coles county, Illinois.

Article 4.

The authorized capital stock of this consolidated company shall be four million dollars ($4,000,000.00), divided into eighty thousand shares (80,000) of fifty dollars ($50.00) each.

Article 5.

The capital stock of this consolidated company shall be issued as follows:

To the stockholders of the party of the first part, one share of the capital stock of this consolidated company for each and every share of stock, par value, being fifty dollars (50.00) of the party of the first part.

To the stockholders of the party of the second part, two shares of the stock of this consolidated company for one share of the stock, par value, being one hundred dollars ($100.00) of the party of the second part.

180 That is to say, the stock of the constituent companies, parties hereto, is to be converted into shares of the stock of the consolidated company and to be exchanged therefor par value for par value.

The remainder of the capital stock of the consolidated company shall be reserved in the treasury of the consolidated company, to be subscribed for and issued or sold, issued and disposed of, as shall be determined by the board of directors to be necessary and proper, from time to time, for the completion of the consolidated road and for the equipment, maintenance, and operation of its said line of railroad.

Article 6.

The government of this consolidated company shall be vested in a board of directors, to be composed of nine members to be elected by the stockholders, and a president and vice-president and such other officers as shall be determined by the board of directors to be necessary and proper, from time to time, for the completion of the consolidated road and for the equipment, maintenance, and operation of its said line of railroad.

Article 7.

The board of directors shall have power to make all such
181 by-laws, consistent with the provisions of the statutes in such cases, and — provided, as shall be necessary and proper for the regulation and control of the property and affairs of the company.

Article 8.

The several shareholders of the said constituent companies, parties hereto, shall have the same rights, powers, and privileges, respectively, in the consolidated company, except as otherwise provided herein, which they now possess and enjoy in the said constituent companies, respectively; and on the execution of these presents or the powers, privileges, immunities, and franchises in any manner possessed by or vested in either of the parties hereto, shall be transferred to and fully vest in the consolidated company; and all and singular the real estate, depot grounds, rights of way, road-bed, railroad iron, rails, engines, cars, and machinery, machine shops, buildings, structures, rolling stock, leases, subscriptions, and local aid and property of every description, name, and nature in

or to which the parties hereto or either of them may possess any right or title, and all property, real, personal, or mixed, and all choses in action or possession, and all privileges and appurtenances, reversions and remainders, belonging to them
182 or either of them shall be and become vested in and be thereafter owned, used, and enjoyed by the said consolidated company without any further or other deed, transfer, or conveyance, and as fully and effectually, to all intents and purposes, as the same are now held by the said constituent parties, respectively. All books, vouchers, records, muniments of title, and other documents pertaining to the business or property of said several companies, parties hereto, shall be placed and remain in the office and custody of the secretary of the consolidated company, and, so far as necessary, the said books, records, and papers shall be deemed and taken to be the books and papers of the consolidated company; and said books, records, vouchers, and papers shall be subject to proper examination and inspection by holders of the stock of the said company during business hours at said office.

Article 9.

The said consolidated company shall assume and pay all engagements of each of said constituent companies, parties hereto.

Article 10.

The regular and annual meeting of the stockholders of said
183 consolidated company shall be held at the principal office of the company, in the city of Charleston, in Coles county, in the State of Illinois, on the first Thursday of October of each year.

Article 11.

The consolidated company shall commence its corporate existence at and immediately upon the execution of these articles by the proper officers of the said constituent companies and the filing of the same in the office of the secretary of state of the State of Indiana and of the State of Illinois, and continue thereafter for the period of fifty (50) years.

Article 12.

It is one of the express conditions of this agreement of consolidation that said two mortgage liens hereinbefore referred to and said mortgage supplemental thereto are, as aforesaid, hereby concurred in by the said party of the second part, and the same are hereby ratified, approved, and confirmed as valid liens upon the real property and franchises of said parties of the first and second part as fully and completely as the same are described and set forth in the said indentures of trust and mortgage.

In testimony whereof the directors of the said The Toledo, Cincinnati and St. Louis Railroad Company, party of the first
184 & 185 part, have caused the corporate seal of said company to be hereto affixed and this agreement to be signed by the president and secretary of said company, who have hereunto set their names and seals.

And the directors of the said The Toledo, Cincinnati and St. Louis Railroad Company, party of the second part, have caused the seal of said company to be hereto affixed and this agreement to be signed by the president and secretary of said company, who have hereunto set their hand- and seals.

This agreement is executed in six copies.

THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY,
Party of the First Part,
By JNO. M. CORSE, *President.*

Attest:
[SEAL.] HERBERT STEWARD,
Secretary of T., C. and St. L. R. R. Co.

THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY,
Party of the Second Part,
By JNO. M. CORSE, *President.*

Attest:
[SEAL.] F. K. DUNN,
Secretary of T., C. and St. L. R. R. Co.

Executed in presence of—
FRANK J. CONNALY.
ALFRED A. THOMAS.

186 STATE OF ILLINOIS, } ss:
County of Coles, }

Before me, a notary public in and for the said State and county, personally came this day Jno. M. Corse, president of the Toledo, Cincinnati and St. Louis Railroad Company, personally known to me to be president of said company, party of the first part to said instrument, and whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said railroad company, had signed and delivered the said instrument as the free and voluntary act of the said railroad company and himself, and for the uses and purposes therein set forth; also personally appeared before me at the same time Herbert Steward, secretary of the said The Toledo, Cincinnati and St. Louis Railroad Company, personally known to me to be the secretary of said company, and whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of the said railroad corporation, party of the first part, signed and affixed to the said instrument the official seal of said railroad company as the free and voluntary act of the said The Toledo, Cincinnati and St. Louis Railroad Company, party of the first part thereto, for the uses and purposes therein set forth.

187 Witness my hand and official seal, at Charleston, Illinois, this 4th day of October, 1881.

[SEAL.] H. A. NEAL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Coles, }

Before me, the undersigned, a notary public in and for said State and county, personally came this day Jno. M. Corse, president of the Toledo, Cincinnati and St. Louis Railroad Company, party of the second part to the foregoing instrument, and whose name is subscribed thereto, and acknowledged that he, on behalf of said railroad company, had signed and delivered the said instrument as the free and voluntary act of the said railroad company and himself, and for the uses and purposes therein set forth; also personally appeared before me at the same time Frank K. Dunn, secretary of the said The Toledo, Cincinnati and St. Louis R. R. Company, personally known to me to be the secretary, and whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of the said railroad corporation, party of the second part thereto, signed and affixed to the said instrument the official seal of said railroad company, party of the second — hereto, as the free and vol-
188 untary act of the said The Toledo, Cincinnati and St. Louis Railroad Company, for the uses and purposes therein set forth.

Witness my hand and official seal, at Charleston, Illinois, this 4th day of October, 1881.

[SEAL.] H. A. NEAL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Coles, }

I, John M. Corse, do hereby certify that I am president of the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, party of the first part to the appended and foregoing agreement and articles of consolidation; that on the third day of October, A. D. 1881, at a special meeting of the stockholders of said corporation duly called for the purpose, pursuant to notice as required by law, which said notice, signed by a majority of the directors of said company, was deposited in the post office more than sixty days before the time fixed for said meeting, properly addressed to each stockholder severally, with necessary postage for the transmittal of the same prepaid, stating the time, place, and object of said meeting, and was also published, more than sixty days and nine successive weeks previous to the day of said meeting, in the Frankfort Saturday Banner, a newspaper
189 printed in the county in which the principal office of said corporation is located, and also in a newspaper published in each county through or into which the road of said company runs and is intended to run, and convened and held at the place specified in said notice, being the principal office of said company, a proposition was submitted to the stockholders of the said company for the adoption of said agreement and articles of consolidation; that upon vote of said stockholders then so had more than two-thirds of all the votes represented by the whole stock of said corporation were cast in favor of the adoption of said agreement and articles.

In witness whereof I hereby sign my name and cause the corporate seal of the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, to be hereto affixed and attested by the secretary this 4th day of October, A. D. 1881.

[L. S.] JNO. M. CORSE, *President.*

Attest:

[SEAL.] HERBERT STEWARD, *Secretary.*

STATE OF ILLINOIS, } ss:
County of Coles, }

190 I, John M. Corse, being first duly sworn according to law, declare on oath, that I am president of the corporation mentioned in the foregoing certificate, and that the statements therein made are true in substance and in fact.

JNO. M. CORSE.

Subscribed and sworn to before me this 4th day of October, A. D. 1881.

[SEAL.] H. A. NEAL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Coles, }

I, John M. Corse, do hereby certify that I am president of the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the State of Illinois, party of the second part to the appended and foregoing agreement and articles of consolidation; that on the 4th day of October, A. D. 1881, at a special meeting of the stockholders of said corporation duly called for the purpose, pursuant to a notice as required by law, which said notice, signed by a majority of the directors of said company, stating the time, place, and objects of said meeting and the respective amounts of said two mortgage liens proposed to be concurred in and ratified, was deposited in the post office more than sixty days before the times fixed for said meeting, properly addressed to each stockholder of said companies severally, with necessary postage for the transmittal *for* the same prepaid, and was also published more than sixty days and for nine successive weeks prior to said day of said meeting in the Charleston Plaindealer, a newspaper printed in the county in which the principal office of said corporation is located, and also a news-
191 paper published in each county through or into which the road of said company runs and is intended to run, and convened and held at the principal office of said company, in the city of Charleston, in Coles Co., Ill., a proposition was submitted to the stockholders of said company for the adoption of said agreement and articles of consolidation, including the concurrence in and ratification of said two mortgage liens; that upon vote of said stockholders then so had more than two-thirds of all the votes represented by the whole stock of said corporation, being more than two-thirds in amount of the whole corporate stock of said corporation,

were cast in favor of the adoption of said agreement and articles, including concurrence in and ratification of said two mortgage liens.

In witness whereof I hereby sign my name and cause the corporate seal of the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the State of Illinois, to be hereto affixed and attested by the secretary this 4th day of October, A. D. 1881.

[L. S.] JNO. M. CORSE, *President.*

Attest:

[SEAL.] F. K. DUNN, *Secretary.*

STATE OF ILLINOIS, } ss:
County of Coles, }

I, John M. Corse, being first duly sworn according to law, declare on oath that I am president of the corporation mentioned in the foregoing certificate, and that the statements therein made are true in substance and in fact.

JOHN M. CORSE.

Subscribed and sworn to before me this 4th day of October, A. D. 1881.

[SEAL.] H. A. NEAL,
Notary Public.

(Endorsements:) 660. 55. Articles of consolidation. The T., C. and St. L. R. R. Co. with The T., C. and St. L. R. R. Co. Filed Oct. 3rd, 1881. E. R. Hamn, secretary of state.

192 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the record and evidence in the matter of The Frankfort and State Line Railroad Company in the cause of Edward F. Leonard *et al. vs.* The Toledo, Cincinnati & St. Louis Railroad Company *et al.*, as fully as the same appears of record and on file in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 6th day of May, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 270. The Frankfort and State Line Railroad Company, appellants, *vs.* Edward F. Leonard, the Toledo, Cincinnati & St. Louis Railroad Company, *et al.* Filed May 17, 1886.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE FRANKFORT AND STATE LINE RAILROAD COMPANY,

vs.

EDWARD F. LEONARD, ET AL.

APPEAL FROM SEVENTH CIRCUIT.

A. C. HARRIS,
W. H. CALKINS,
Solicitors for Appellant.

SENTINEL PRINTING CO., INDIANAPOLIS.

In the Supreme Court of the United States.

THE FRANKFORT AND STATE LINE RAILROAD COMPANY,

vs.

EDWARD F. LEONARD, ET AL.

APPEAL FROM SEVENTH CIRCUIT.

Abstract.

The bill in this suit was filed June 16, 1884. Edward F. Leonard, a bondholder, brought the suit. He made the appellant, The Toledo, Cincinnati & St. Louis Railroad Company of Indiana and Illinois, The Toledo, Cincinnati & St. Louis Railroad Company of Ohio, Indiana and Illinois, the Central Trust Company of New York, Thomas A. Hendricks and Greenville D. Braman defendants.

The Bill,

among other things, contains substantially the following allegations: That the Toledo, Cincinnati & St. Louis Railroad Company is a corporation created and existing under the laws of the States of Ohio and Indiana and Illinois; and that the like named railroad corporation defendant was created and existed under the laws of Indiana and Illinois; that the Frankfort & State Line Railroad Company is a corporation, created and existing by and under the laws of the State of Indiana.

That on July 23, 1881, the Indiana and Illinois corporation duly executed its three thousand bonds for one thousand dollars each, payable in gold coin and due July 1st, 1921, with interest at the

rate of six per cent. per annum, payable semi-annually, on January 1st and July 1st of each year, at the city of New York or London, England. That coupons attached thereto represented these different installments of interest. That 2,800 of these bonds were certified by the Central Trust Company of New York and Thomas A. Hendricks, trustees named therein, and were by the railroad company put upon the market and sold and were then held by a large number of persons as owners. The proceeds of the bonds had been applied to the construction and completion of the railroad. The line of railroad thus built extended from Kokomo, Indiana, to East St. Louis. That a short line between Kokomo and Frankfort, Indiana, had been acquired by the defendant, subject to the payment of 200 bonds of $1,000 each, dated January 1st, 1879, and that the trustees had held 200 bonds of the first named corporation to exchange for the 200 outstanding bonds of the short line; 124 of which they had actually certified and exchanged for a like number and amount of said last named corporation, which said 124 bonds were also outstanding and held and owned by divers persons.

That on July 23, 1881, the Indiana and Illinois corporation executed and delivered to the Central Trust Company, of New York, and Thomas A. Hendricks, as trustees, its certain deed of trust, or mortgage on all and singular its right of way, tracks, (about 267 miles in length), turn-outs, stations, depot grounds, road-bed, fences, bridges, sidings, engine-houses, machine-shops, buildings, erections, acquired and thereafter to be acquired, tools, machinery then owned or to be acquired, etc., together with its franchises, tolls, revenues and incomes, etc., to be held in trust for the payment of the interest and principal of the bonds before described. That the mortgage was duly recorded in the several counties through which the road ran.

It is further shown that the mortgage contained a clause providing that in case any installment of interest became due and remained unpaid for sixty days, the parties might take possession and sell the road and property covered by the mortgage, and apply the proceeds to the payment of interest due, and the balance should be applied rateably to the payment of the principal. It is further shown that an error was made in the first mortgage, and to correct it another instrument or supplemental mortgage was made, exe-

cuted and delivered by the Indiana and Illinois corporation to the trustees. No question arises on this, and it need not be further alluded to.

The allegation next following is the vital one, so far as this contest is concerned, and we therefore set it out in full. It is the fifth clause of the bill, and is as follows, viz:

"Your orator shows that as to so much of said line of railroad as lies between the city of Frankfort, in the county of Clinton, State of Indiana, and the line dividing the States of Indiana and Illinois, extending southwestwardly from said city of Frankfort to a point on said State line, near the town of Eugene, in the State of Indiana, being a distance of about sixty miles, the said mortgage hereinbefore first above described, creates an equitable lien only, and is not a legal mortgage thereon; that the legal title to said sixty miles of road was, at the date of the said mortgage and still is, vested in The Frankfort & State Line Railroad Company, which is a corporation created by and existing under the laws of the State of Indiana.

"That before said sixty miles of railroad of said last named company, or any part thereof, was built, to-wit: The 31st day of August, 1880, said Frankfort & State Line Railroad Company, and a certain company known as The Western Construction Company, entered into a contract in writing, whereby, among other things, it was mutually agreed between them in substance and effect as follows, viz: That said construction company should build the railroad of said railroad company between the points aforesaid, being the sixty miles of road aforesaid, and that in consideration thereof, said railroad company should make, execute and deliver to said construction company its corporate bonds, secured by mortgage on its said line of railroad, to an amount equal to $10,000 for each mile of road so to be constructed, said mortgage bonds to bear interest at the rate of 7 per centum per annum and to be a first lien upon the railroad and other property of said railroad company, and also that it should deliver to said construction company paid-up certificates for all its said railroad company's capital stock, to-wit: shares of ——— each, amounting in all at its par value to $2,000,000, provided that said construction company should pay and deliver therefrom to third parties such portions or shares thereof as should be due to such third parties upon subscription, or for tax, or local aid.

"That pursuant to said agreement, said construction company built said line of railroad and received from said railroad company certificates for ——— paid-up shares of said capital stock, amounting at par value to $1,800,000. The remaining $200,000 of said capital stock was retained by said Frankfort & State Line Railroad Company, out of which to satisfy said claims of third parties for subscriptions, or for tax, or local aid The exact amount necessary for such purpose is not known and cannot be ascertained until certain taxes, or local aids are collected, but your orator is advised that the whole of said $200,000 of stock so retained will not be needed for that purpose, but that a considerable amount thereof will remain to be turned over pursuant to terms of said agreement

"From the first and during all the time of the construction of said sixty miles of railroad it was the purpose and intention of the promoters of said Frankfort & State Line Railroad Company, and of said railroad company itself and all the parties interested therein, that said sixty miles or thereabout of railroad should form a part of one continuous line of railroad extending from said city of Kokomo to said city of East St. Louis, and that said railroad company should become a constituent part of said Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois).

"The bonds and mortgages provided for in said agreement were never, in fact, made or executed, nor did said constructing company ever request or demand that the same should be made or executed. On the contrary, said Western Construction Company, having like contracts with said Toledo, Cincinnati & St. Louis Railroad Company for the construction of the other portions of said line from Kokomo to East St. Louis, procured said last-named company, with the acquiescence and consent of said Frankfort & State Line Railroad Company, to make the bonds and mortgages hereinabove first described, and with like acquiescence and consent of said last-named company, received an equivalent amount of the bonds herein first above described in lieu of the mortgage bonds of the Frankfort & State Line Railroad Company provided for in said construction agreement.

"From the time of the completion of said line of railroad extending from Frankfort to the Indiana and Illinois State line until the commencement of this suit said line had, in fact, been in the possession of the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois), and had been used by it as a part of its line from Kokomo to East St. Louis, with the full acquiescence and consent of the Frankfort and State Line Railroad Company, and since the bringing of this suit has been and still is in the possession of the court through the receiver, used and operated as a part of said continuous line.

"In the construction of other portions of the line from Kokomo to East St. Louis the Western Construction Company became largely indebted to divers contractors, who claimed liens by reason thereof on said line of railroad, and, being unable to pay the same in money, the capital stock of the Frankfort & State Line Railroad Company received and to be received as aforesaid by the Western Construction Company was reserved by it as a fund out of which to accomplish payment of the debts owing to contractors.

"Afterwards, on or about the twentieth day of March, 1883, an agreement was entered into between the Toledo, Cincinnati & St. Louis Railroad Company, of the first part; the Frankfort & State Line Railroad Company, of the second part; the Western Construction Company, of the third part; the American Loan & Trust Company, of Boston, a corporation of Massachusetts, of the fourth part, and said contractors or certain of them, of the fifth part, whereby, after reciting, among other things, the facts aforesaid relating to said line of railroad from Frankfort to the state line, the manner and purpose of its construction, and the mode of paying for its construction, it was, among other things, agreed in substance as follows, viz: That said first party should assume said debts or certain specified portions

thereof of said construction company to said contractors; that the second party, the Frankfort & State Line Railroad Company, should forthwith deliver to said construction company the remainder of its capital stock due for the construction of its road, to-wit: Stock amounting to $1,800,000, being the same $1,800,000 of stock above mentioned; that the third party, the construction company, should, and thereby did, deliver said capital stock to the fourth party, the American Loan & Trust Company, subject to the following trusts, viz: To hold as security for the payment of the debts assumed by the first party in certain specified installments, and upon such payment to be delivered over to certain third person for the use of the first party; but should default be made in the payment of any installment, that then all should become due, and the stock or so much of it as might be necessary should be sold for the payment of the same. Said second party also agreed to turn over to the Trust Company, the fourth party, subject to the same trust, all the remainder of said capital stock after satisfying the claims thereto of subscribers and on account of tax or local aids.

"Your orator shows that said Toledo, Cincinnati & St. Louis Railroad Company, party of the first part to said agreement and defendant herein, made default in the payment of portions of said debts so assumed by it, and that thereupon, upon the demand of creditors interested, said American Loan and Trust Company advertised and was about to sell at public sale all of said capital stock or so much thereof as might be found necessary for the payment of said debts; that to prevent the sacrifice of said stock at such sale and to prevent the breaking of the continuity of said line of railroad from Kokomo to East St. Louis that might result from the passing of the capital stock of said Frankfort & State Line Railroad Company into other and perhaps adverse hands, the Circuit Court of the United States for the Southern District of Illinois, upon the petition of William J. Craig, the receiver appointed in the suit pending in the said Circuit Court of the United States for the Southern District of Illinois, hereinafter mentioned, filed therein on the —— day of January, 1884, by its decretal order authorized and directed said receiver to make and execute receiver's certificates that should be a paramount lien on said line of railroad from Kokomo to East St. Louis wherewith to pay said debts, to secure which said capital stock was so held in trust.

"It was further directed in said order that when said capital stock should be so redeemed it should be held by said receiver, subject to the order of the court, as further security for the payment of the receiver's certificates so to be issued, and after payment of said certificates to remain subject to the further order of the court as to its final disposition.

"For greater particularity your orator prays that reference may be had to the record of said petition and said order of court as the same remain of record in said cause.

"Your orator is advised that, pursuant to said order, the said receiver has executed receiver's certificates to an amount equal to the debts for which said capital stock was pledged in trust, and has effected an arrangement with

said creditors by which they have accepted said receiver's certificates in satisfaction of their claims, and that all the certificates of said capital stock so pledged in trust, amounting at par value to $1,800,000, are now in the possession of the receiver, pursuant to said order."

The 6th clause of the bill refers to certain terminal facilities at East St. Louis, and need not be further mentioned, as they are not drawn in question in this appeal.

The 7th clause of the bill refers to the default in the payment of three installments of interest, the demand and the failure to pay. Also that the trustees disagreed and refused to bring suit in Indiana. That as a bondholder and owner of $25,000 par value of bonds and coupons, he brings the suit not only for himself, but for all other bondholders secured by the mortgage.

The 8th clause of the bill relates to a second or junior mortgage, to secure 3,500 income bonds of par value of $1,000 each. It was made to the same trustees and covered the same property described in the first mortgage. These bonds were to be paid out of the net income of the railroad. It never had sufficient to pay interest on the first mortgage bonds, and so the second mortgage bonds were not paid. It is not material to refer further to this clause, except to say that the bill does not claim that this mortgage was a lien on the property of The Frankfort & State Line Railroad Company.

The 9th clause of the bill alleges that in February, 1882, The Toledo, Cincinnati & St. Louis Railroad Company, of Indiana and Illinois, the Frankfort, St. Louis & Toledo Railroad Company, (an Indiana corporation) and the Toledo, Delphos & Burlington Railroad Company undertook to consolidate and unite their several lines of railroad, under the name of The Toledo, Cincinnati & St. Louis Railroad Company, under the laws of the respective States of Ohio, Indiana and Illinois, and thereby to transfer and vest all and singular, their and each of their properties in said last named corporation, but in and by the acts of consolidation they recognized the mortgages in the bill described, and expressly then assumed the payment and all interest due thereon.

The bill further shows that The Toledo, Cincinnati & St. Louis Railroad Company, in May, 1883, consolidated with divers other railroads then in existence in Ohio, and by such acts merged itself, its stock, franchises and property into a corporation still called The Toledo, Cincinnati & St. Louis Railroad Company. It is not necessary to refer with greater particularity to these several acts.

The 10th clause of the bill alleges that the two principal mortgages before described, are a prior and paramount lien on the property and franchises of the railroad company, notwithstanding the various consolidations and agreements made by the company after the date of said mortgage.

The bill then sets out a list of mortgages, made and executed by the various constituent railroads, which then formed the consolidated line of The Toledo, Cincinnati & St. Louis Railroad Company; but which have no relevancy to the controversy here. The averment of total insolvency is made against the last named railroad company, and the usual prayer for foreclosure and sale follows. In the prayer it is asked that the first mortgage mentioned may be adjudged and declared to be and to constitute a first lien upon said line of railway of the appellant, and that the rights and interests of the bondholders secured by that mortgage, and the capital stock of the appellant may be ascertained, decreed and determined, and that all of the appellant's property may be sold under the decree freed and discharged from all liens and claims of the parties to said bill, and the proceeds applied to the extinguishment of complainant's and his co-bondholders' obigations.

The Frankfort & State Line Railroad Company filed an answer to so much of the bill as sought to affect it, on the 23d day of June, 1885.

The answer alleges:

1st. That it is a corporation organized and existing under and by virtue of the laws of Indiana, and that as such corporation it owns a railroad extending from the city of Frankfort to the west line of the State, about sixty miles in length.

2d. That $175,000 of tax and local aid was voted by towns and cities through which it ran to the road to aid in its construction in consideration of an equivalent sum par value of the stock of said railroad company, which has been issued and is now outstanding; also $25,000, par value, of stock has been issued to various persons in payment for rights of way—making $200,000 par value in all.

3d. It denies that its road ever consolidated with the T., C. & St. L. Co. or any other company.

4th. It admits that by the original contract between it and the Western Construction Company, it was to give the latter company

$10,000 par value of its first mortgage bonds, but it denies that they were ever made, executed or delivered. It further denies that there was ever any understanding or agreement between it and the T., C. & St. L. Co., whereby the bonds of the last-named company were given to the Western Construction Company in lieu of the bonds agreed by it to be issued and delivered.

5th. It admits that the bonds it was to deliver to the Western Construction Company were not delivered; but that it turned over the $200,000 received as donations and local aids, to the T., C. & St. L. Co. and its shares of corporate stock amounting to $1,800,000, which were ample for the construction of its railroad, except a debt of $40,000, which is still owing.

6th. It admits the placing in trust of the $1,800,000 of stock, but denies that it should be held except for the payment of the $40,000 construction debts which it still owes.

7th. That whatever might have been the original intention of the promoters of the railroad, it shows that at least it was not intended to consolidate appellant's railroad with the T., C. & St. L. Co. It was purposely excluded and held out from such consolidation, and that it has never agreed that its property should be mortgaged by the T., C. & St. L. Co. or by any one else.

8th. That it was the purpose of the T., C. & St. L. Co. to control appellant's railroad, and use it as a part of its line by getting possession of a majority of its shares of capital stock. For that purpose the contract mentioned in the bill was made whereby $1,800,000 of its stock was placed in the hands the Loan and Trust Company of Boston.

9th. As a consummation of this scheme the lease or contract was made by and between the appellant and the T., C. & St. L. Co., whereby the latter corporation was granted the right to use the railroad and property of the appellant for one year and operate it as a leased line.

10th. That certain taxes and local aids voted and donated to appellant had not been collected, nor paid over to it. To consolidate with the T., C. & St. L. Co. would prevent the appellant from collecting the money. In order to get this, both corporations agreed to, and did withhold proceedings for consolidation indefi-

nitely, and the property and franchises of appellant were thus purposely, and by consent kept from, and were not covered by the mortgage in suit.

11th. That the T., C. & St. L. Co. was formed by consolidating several railroads into one company. That in said consolidations a perfect line between Toledo and St. Louis was made on paper, but that the space between Frankfort and the State line west existed as a "paper line" only, and it was this "paper line" that was included in the said consolidation and in the mortgage and not the railroad of appellant, all of which was well known, and that the mortgage in suit was not intended by either railroad company to rest upon, or be a lien on appellant's railroad and property. *In other words, the exact property and franchises intended to be mortgaged was mortgaged;* and the property of appellant was not intended to be, and was not included in the mortgages in suit.

The replication was a general traverse.

The Decree.

So far as the decree affects the appellant it is as follows:

"*Third.* The court further finds that so much of said railroad described in the aforesaid mortgages as lies between the city of Frankfort, Clinton county, Indiana, and the line dividing the States of Indiana and Illinois, being about sixty miles in length, was constructed by a company known as the Western Construction Company, under a written contract entered into between it and said Frankfort & State Line Railroad Company on the 31st of August, 1880, except eleven and three-tenths miles that had theretofore been built; that it was intended by both parties to the contract that the road to be constructed should become by consolidation a portion of a continuous line of narrow gauge railroad extending from Toledo, Ohio, to East St. Louis, Illinois.

"That in the contract it was provided, among other things, that as payment for the labor and expense of construction, the Frankfort & State Line Railroad Company should make and deliver to the construction company its corporate seven per cent. bonds at the rate of $10,000 for each mile of the road, secured by first mortgage on the road, and should also deliver to it certificates for all the shares of its capital stock, as fully paid up, except so many shares thereof as might be found necessary to fill individual and municipal subscriptions thereto.

"That the total number of the shares of capital stock of said Frankfort & State Line Railroad Company, amounting at their par value to $2,000,000, and that said construction company received therefor on its said contract a number of shares amounting at their par value to $1,800,000.

"In and by said contract it was further, among other things, provided that said bonds so to be paid and delivered to said construction company should bear interest at the rate of seven per cent per annum, payable semi-annually, on the first days of January and July of each year, beginning on the first day of January, 1881, and should be secured by a first mortgage on all the property, both real and personal, of said railroad company.

"The said construction company afterwards pledged all the said shares of capital stock so received by it to secure debts owing by it to sub-contractors for work done and materials furnished in the construction of said Frankfort & State Line Railroad and other portions of the said Toledo, Cincinnati & St. Louis Railroad Company; that by a written contract afterwards, to-wit: on the 20th day of April, 1883, entered into between The Toledo, Cincinnati & St. Louis Railroad Company, a corporation of the States of Ohio, Indiana and Illinois, hereinafter mentioned, said Frankfort & State Line Railroad Company, said Western Construction Company, and others, it was stipulated and agreed, among other things, in substance and effect, that said Toledo, Cincinnati & St. Louis Railroad Company should assume and pay all the debts of said Western Construction Company for which said capital stock was so pledged, and that upon such payment all said $1,800,000 of capital stock should become the property of said Toledo, Cincinnati & St. Louis Railroad Company, and that the same might be used for the purpose of effecting the consolidation of said last named company, with said Frankfort & State Line Railroad Company, said capital stock meanwhile remaining in pledge as a security for such payment.

"That said Toledo, Cincinnati & St. Louis Railroad Company failed prior to the commencement of this suit and the appointment of a receiver therein, to pay said debts so assumed by it.

"That the receiver has, under the authority of the Court, paid all the debts assumed by said Toledo, Cincinnati & St. Louis Railroad Company, for which said capital stock was so pledged, amounting in all to $————, by making and delivering to the respective creditors receiver's certificates therefor, which are a lien upon said line of railroad extending from Kokomo to East St. Louis, and as further security for the payment of which he received and now holds the certificates for all of said $1,800,000 of such capital stock, and after the payment of said receiver's certificates, he will hold such capital stock subject to the order of the Court.

"It is further found that after the making of the said contract of August 31st, 1880, by the Western Construction Company and The Toledo, Cincinnati & St Louis Railroad Company, of Indiana and Illinois, for the construction of the road of the latter company, and before said road was constructed, to-wit: on the 9th day of June, 1881, said Western Construction Company and said Toledo, Cincinnati & St Louis Railroad Company, of Indiana and Illinois, entered into a written contract by which said construction company agreed to build and construct the entire line of said railroad company from said city of Kokomo, Indiana, to said city of East St. Louis, Illinois, through the counties and places mentioned in the aforesaid mortgage, a distance of about 270 miles. As payment for the labor and expense of

construction, The Toledo, Cincinnati & St. Louis Railroad Company agreed to execute and deliver to the construction company its corporate first mortgage bonds to the amount of $3,000,000, and its second mortgage income bonds to the amount of $6,000,000, and its capital stock amounting at its par value to $4,000,000.

"That the specifications as to the manner and character of construction of said line of railroad were substantially the same as those contained in said contract of August 31, 1880, for the construction of said Frankfort & State Line Railroad.

"That after the making of said construction contract of June 9, 1881, it was agreed by and between said Toledo, Cincinnati and St. Louis Railroad Company, and said Western Construction Company that the bonds and mortgage of said Toledo, Cincinnati & St. Louis Railroad Company, herein first above mentioned should be executed and said entire line built with the proceeds of sale of the bonds, and that the separate mortgage on said Frankfort & State Line Railroad provided for in said construction contract of August 31, 1880, should not be executed, inasmuch as it was believed that bonds secured by a general first mortgage on the entire line could be sold more advantageously in the market than bonds secured by a divisional or sectional mortgage; that thereupon, with the acquiescence of said Frankfort & State Line Railroad Company, the bonds and mortgages hereinabove mentioned were executed, and with money derived from the sale of said bonds said Frankfort & State Line Railroad was built.

"That upon the completion by said Western Construction Company of said Frankfort & State Line Railroad, to-wit: in the spring of 1882, the same was by said Frankfort & State Line Railroad Company turned over to and placed in full possession of said Toledo, Cincinnati & St. Louis Railroad Company, of Indiana and Illinois, as its property and as a part of its said line of railroad extending from the said city of Kokomo to said city of East St. Louis, from and after which time and until taken possession of by the receiver herein, the same remained in the exclusive possession of said last named company and was used and operated by it as a part of the said line.

"That a legal consolidation of said Frankfort & State Line Railroad Company and said Toledo, Cincinnati & St. Louis Railroad Company, of Indiana and Illinois, was not made for the reason that said companies and said construction company were advised by counsel that such consolidation might operate a forfeiture of certain local aid or municipal subscriptions to the capital stock of said Frankfort & State Line Railroad Company, but that it was still intended by said companies that such consolidation should be made, that said $1,800,000 of the capital stock of said Frankfort & State Line Railroad Company should be used and voted for that purpose.

"That it was known to the directors and active promoters of said Frankfort & State Line Railroad Company that its road was being built with moneys derived from the sale of said bonds of The Toledo, Cincinnati & St. Louis Railroad Company secured by said mortgage embracing its line, instead of moneys obtained by mortgage bonds provided for in said construction contract of August 31, 1880.

"It is found that said Central Trust Company, of New York, and said Thomas A. Hendricks, as trustee for the holders of said 2,930 bonds, now outstanding, secured by said first above mentioned mortgage, and for their benefit have in equity a lien on said Frankfort & State Line Railroad, and that the purchaser or purchasers of said mortgaged premises under this decree will, by virtue of such purchase, be entitled to take, hold, and own said $1,800,000 of the capital stock of said Frankfort & State Line Railroad Company."

The proceeds arising from the sale are ordered to be distributed as follows, viz:

"*First.* To court costs and master's fees as the same may hereafter be ascertained

Second. To said Farmers' Loan and Trust Company said sum of eighty-five thousand one hundred and eight dollars and twelve cents, due on said bonds and coupons of said Frankfort & Kokomo Railroad Company.

Third. To court and receiver's indebtedness and solicitors' and counsel's fees.

Fourth. *Pro rata* distribution upon the coupons and bonds secured by the indenture and mortgage by this decree foreclosed.

Fifth. *Pro rata* distribution upon the income bonds hereinbefore mentioned."

Thereupon counsel for appellant moved the court to modify the decree as follows:

"The counsel for the defendant the Frankfort & State Line Railroad Company, and John S. Smith and Elverton R. Chapman requested and moved the court to insert in the foregoing decree a provision requiring the Toledo, Cincinnati & St. Louis Railroad Company to return to the possession of the Frankfort & State Line Railroad Company certain rolling stock and tools that had been delivered by said last-named company to said first-named company at the time of the delivery of possession of said Frankfort & State Line Railroad, said property being described by the witness James H. Rice, as the following:

"One locomotive, three or four flat cars—construction cars—and sevaral hand-push cars and some tools."

This was denied by the court.

The Evidence

Is all in the record. There is no material conflict. The first and second mortgages are in the usual form of such instruments and on their face do not refer to the appellant's railroad or property, and for that matter do not refer to the appellant at all. The two supplemental mortgages, as shown by the bill, were made to correct

an error in the two original mortgages—some county in Illinois having been left out—and therefore have no relevancy to the contention made here. (Rec., pp. —.)

Mr. A. A. Thomas, a witness for the complainant, testified:

"Mr. Ballou in a conversation with me about this time said: 'That the Toledo, Delphos & Burlington Railroad Company then extended from Toledo to Kokomo; that its mortgages were executed and could not be changed; that its road was practically completed except from Warren west to Kokomo, and that that was under construction contract. That a subscription had been offered of $3,000,000 for a three million dollar mortgage from Kokomo to St. Louis covering the railroad, and that upwards of one-third, or one million dollars, of such bonds had been sold; that what he wanted was to get the railroad as quick as might be, and he wanted me to take charge of the legal work for him. He explained the plan by which they proposed to proceed and by which they did proceed. He said he wanted the road known as T., C. & St. L. (Toledo, Cincinnati & St. Louis) to be incorporated immediately in Indiana. That then they would buy one or two existing roads, or had bought them, and that of one or two newly organized roads they would procure the right of way, as the road would be so constructed under contracts between the Western Construction Company and these, which he termed constituent roads. He explained to me that further west, in Illinois, lay one—on the east half of Illinois was another—that the Frankfort & State Line was another—the Frankfort & Kokomo was another—and the thing to be done was to effect a corporate organization and by consolidation as quickly as may (might) be, get a line and build up a road beneath the mortgage. This was carried out to the end. As each constituent company would be consolidated in, it would in the consolidation proceedings ratify the existing mortgage except that the Frankfort & State Line road was never consolidated." (Rec, pp. 70 —.)

Mr. Thomas also testified to certain memoranda appearing on the books of the Frankfort & State Line Railroad records. The first relates to the settling with Mr. King (Rec., pr. p. 66) a contractor, and contracting with some other persons for completing the railroad. (Do.)

The next one is the resolution directing the president and secretary to enter into an operating contract and lease with the T., C. & St. L. R. R. Co., date April 20, 1882. (Rec., p. 67.)

Exhibit "C," attached to Craig's deposition, is identified as the contract drawn in pursuance of this resolution. Mr. Thomas thinks it was signed (Rec., p. 67), and Mr. Craig thinks it was not signed. (Rec., p. 53.) Both agree that it is the contract under which the T., C. & St. L. Co. took possession of the appellant's railroad.

The next was a resolution which gave authority to execute another lease or contract; but it was never done. (Rec., pp. 67-68.)

The next two were resolutions authorizing the secretary to issue stock to the Western Construction Company.

The next is an identification of the contract known as the trust agreement. (Rec, p. 37.)

The witness says he was general attorney for the T., C. & St. L. Co. and connected with the directory of the Frankfort & State Line Company.

Ballou was constituted fiscal agent of the T., C. & St. L. Co. and the Western Construction Company. Ballou sold most of the bonds of the railroad and put them to the credit of the Western Construction Company. The Frankfort & State Line Company was built with the money raised in that way. The money arising from all sales of T., C. & St. L. bonds was kept in one fund. It was put into "one pot" and drafts were paid from it when drawn by the Western Construction Company. The latter company failed before completing the line, and before all the bonds were sold. The Delphos Trust completed the road and divided the proceeds of the bonds. The T., C. & St. L. Co. did not intend to build any other line of road from Frankfort to Illinois State line except the Frankfort & State Line Railroad. General Corse was in Frankfort, and the old board of directors met and turned the road over to him. He then selected his new board. He was at the time president of the T., C. & St. L. Co. He, witness, was elected president of the Frankfort & State Line. Afterwards Mr. Rice was elected president. He can not say certainly that all the directors knew where the funds came from to complete the road. Some of them did. (Rec., p. 73.)

The trust agreement was made to prevent suits being brought, etc.

He was elected president April 20, 1882. Only knows where the fund came from to build the Frankfort & State Line Railroad by conversation with Mr. Ballou and General Corse. The Frankfort & State Line Railroad Company had no money only that derived from donations and aids voted.

W. J. Craig, a witness called by complainant, was president of the Western Construction Company; it constructed a part of the Toledo division, part of Dayton division, etc., and nearly the whole of the St. Louis division of the T., C. & St. L. R. R.

The Western Construction Company was an Ohio corporation.

The roads that constituted that part of the line between Kokomo and East St. Louis were the Frankfort & Kokomo, the Frankfort & State Line, the Tuscola, Charleston & Vincennes, the Charleston, Neoga & St. Louis, a "paper road" by name of Vermillion & State Line. The Western Construction Company built the Frankfort & State Line except eleven and three-tenths miles.

Construction contract lost. It was recorded in a book I kept. Mr. Ahl, of Boston, has charge of the papers.

Exhibit "A" is a correct copy of contract. Eleven and three-tenths miles were constructed before our contract was made. The two corporations, viz: The Toledo, Cincinnati & St. Louis R. R. Co., of Illinois, and The Toledo, Cincinnati & St. Louis R. R. Co., of Indiana, were organized in October, 1881. The Western Construction Company entered into a contract in writing with the T., C. & St. L. R. R. Co. for constructing its railroad.

Exhibit "B" is a true copy. The Western Construction Company did not receive the bonds of the Frankfort & State Line Company mentioned in its contract, Exhibit "A," for the reason that it was intended to consolidate it with the T., C. & St. L. R. R. and it would be more convenient not to have a separate mortgage on record; as the bonds would scatter it was best to have one mortgage.

The contract with the T., C. & St. L. provides for issuing $3,000,000 first and $3,000,000 second mortgage bonds.

I don't know enough about it to know why we did not receive the Frankfort & State Line bonds, only I know we did not ask for them. Mr. Ballou, the treasurer, would know. He was fiscal agent. I drew drafts on Mr. Ballou as president of the Western Construction Company and he paid them. He was handling the bonds of Eastern systems.

The Frankfort & State Line was not consolidated with the T., C. & St. L. The reason was that a large amount of local aid had been voted to the Frankfort & State Line Company to aid in its construction and had not been collected, and we were advised by counsel that if it was consolidated it would prevent the collection of the tax. We (the construction company) expected to cause its consolidation. The Frankfort & State Line was built by us, except eleven and three-tenths miles, and as a part of the continuous line

from Kokomo to East St. Louis. Don't know, but presume directory of the Frankfort & State Line Company knew of execution of mortgage in suit because it was recorded. They did not know where the money came from to build it. (Rec , p. 48.)

The Frankfort & State Line Company bonds were printed and left with trustee Carter, but never called for. (Rec., p. 48.)

The construction company abandoned the idea of calling for them and expected to get T., C. & St. L. bonds instead. I mean by that the bonds in suit. (Rec., p. 49.)

The construction company got the stock. I have it now. It was placed in my hands as receiver. I got it from loan and trust company of Boston. It was put in trust under the written agreement of March 20, 1883. (Rec., pp. 37 and 50.)

Cross-Ex. There was $90,000 tax and $15,000 subscription given to the Frankfort & State Line Company to aid in its construction, besides all of the eleven and three-tenths miles had been paid for by local aid, except $24,000. (Rec., p. 50.)

The length of the road is sixty-seven miles. At the time of making contract with T., C. & St. L. we had grubbed, cleared and graded the Frankfort & State Line Railroad, and done a good deal of timber work and had gotten a good many ties—had bridges, done, etc. (Rec., p. 50.)

The construction company had entered into contract with a number of local railroad companies to build a number of roads from Kokomo to East St. Louis; all of them were to give us a majority of stock when we completed them. Then we intended to unite them in one road. We then agreed to take bonds in the united road for our construction work. (Rec., p. 57.) The amount was not apportioned *pro rata* among the roads, but we took so much per mile on the united line, and without reference to the contract with the local roads. That is the reason why we abandoned our contract with the Frankfort & State Line Company. The contracts with the different companies varied.

Re-Ex.—The specifications in all contracts were similar. An operating contract was made between the T., C. & St. L. and Frankfort & State Line Company. It was made, but not signed. (Exhibit C. Rec., p. 61.)

(Note.—Mr. Thomas says this contract was signed.) Rec., p. —.

Mr. Craig was recalled and examined as a witness for appellant and testified: That there were two lines of railroads known as the T., C. & St. L. Railroad. One extended from Toledo to Kokomo with branches off in Southern Ohio. The other from Kokomo to East St. Louis. Construction work was done on all these roads at once. All donations and aids were voted to the Frankfort & State Line Company. No aids or donations were made to the T., C. & St. L. Co. The construction company were to get $4,000 per mile in local aids, etc. (Rec., p. 63.) The eleven and three-tenths miles of railroad already constructed was taken by us in lieu of a certain amount of local aid.

The contract between the construction company and the Delphos Trust was that the trust should complete the unfinished construction work on the T., C. & St. L. and Frankfort & State Line, and the stock of the latter company was to remain in my hands till the work was completed and the debts paid. The way that stock got into the hands of the loan and trust company was, that the Delphos Trust and T., C. & St. L. Co. failed to pay the contractors. They threatened to take mechanics' liens on the road. One hundred and thirty thousand dollars in round numbers was still owing to them. In pursuance of the agreement of March 20, 1883, (Rec. p. 37), I turned the stock over to the loan and trust company for the purposes therein named. Afterwards in pursuance of an order of Judge Drummond I issued receiver's certificates for the debts and took this stock out of the trust. It was transferred to E. P. House, instead of me. He is the Delphos Trust man. The Frankfort & State Line was completed by the Construction Company; all rights of way and all construction was prosecuted and done by us in the name of the Frankfort & State Line Company. Mr. Thomas is mistaken as to the time when he became connected with the Frankfort & State Line Company. (Rec. p. 65.)

James H. Rice, president of Frankfort & State Line Railroad Company. Was secretary before elected president. Was the person who procured rights of way for that company. We had procured all the rights of way in the name of Frankfort & State Line Railroad Company before the road was leased to the T., C. & St. L. R. R. Co., with the exception of two or three pieces not to exceed one-half mile in length. These were in litigation. The T., C. & St. L.

made no payments for rights of way; there were none to get. The Western Construction Company had procured all of them. (Rec., p. 76.)

Cross-Ex. At the time we bought and procured the right of way for Frankfort & State Line Company there was no T., C. & St. L. R. R. Co. It was organized before we completed the work, I think. We intended to connect Toledo and East St. Louis by the general system. The Western Construction Company was to procure the rights of way by the contract. (Rec., p. 78.)

Re-Ex. When T., C. & St. L. R. R. Co. took possession of Frankfort & State Line Railroad it had as equipments one locomotive engine, three or four construction cars and several hand-push cars and some tools.

Re-Cross-Ex. Everything, including equipments, were taken possession of by the T., C. & St. L. Co. Everything went together. (Rec., p. 78.)

Western Construction Company did not turn the Frankfort & State Line Railroad over to T., C. & St. L. Co., but we leased it to the latter company. This was after our contract with T., C. & St. L. and after road was built. (Rec., p. 79.)

The "paper line" or charter of the T., C. & St. L. Co. through Indiana is shown by charter. (Rec., p. 79.)

The consolidation of this company and the recitals of general consolidations is shown by articles beginning at Record p. 81.

The contract between the Western Construction Company, and the Frankfort & State Line Company is found Rec., p. 54, *et seq.*

The only provisions of the contract which it is thought necessary to refer to is:

First. The mortgage to be given to the Western Construction Company was to secure bonds of $10,000 per mile. (Rec, p. 55.)

Second. The agreement to give to the Western Construction Company all of its shares of capital stock paid up, in installments, as the work progresses. (Rec., p. 55.) And,

Third. The provision that $4,000 per mile was to be raised by subscription or local aid. (Rec., pp. 55-6.)

The contract between the Western Construction Company and the Toledo, Cincinnati & St. Louis Railroad Company is found Rec., p. 57, *et seq.*

The only clause which it is necessary to call attention to is that by which $3,000,000 first mortgage bonds, and $3,000,000 income bonds, and $4,000,000 stock were to be given to the Construction Company in consideration of the construction of the railroad. (Rec., p. 59.)

'Note.—The bonds and mortgages herein provided for are the ones in suit.'

The next contract is the one known as the trust agreement, by which it is provided that $1,800,000 par value of stock, of the Frankfort & State Line Company, shall be put in the hands of the Loan and Trust Company of Boston, to be held in trust for the T., C. & St. L. Co., and be given to it when it pays $134,000 of construction debts, which are named.

The remaining agreement or lease of the Frankfort & State Line Company to the T., C. & St. L. Co. is to the effect that the T., C. & St. L. Co. may take possession of and run its engines and cars over the Frankfort & State Line Railroad for one year, and so long thereafter as the directors of the latter company may deem best—the T., C. & St. L. Co. becoming liable for all injuries to persons and property in operating the road. Rec. p. 61.

(No date appearing to this it can only be fixed by referring to Mr. Thomas' testimony, Rec., p. 67.) He gives it there as about April 20, 1882.

The first mortgage contains the following clause:

"Now, therefore, under the authority and power aforesaid, in order to secure the payment of the principal and interest of said issue of three million dollars of bonds, and in consideration of the premises and the further payment by the party of the second part unto the party of the first part of the sum of one dollar, the receipt of which is hereby acknowledged, the Toledo, Cincinnati & St. Louis Railroad Company has bargained, sold, granted, conveyed and confirmed, and by these presents do bargain, grant, sell, convey and confirm unto the Central Trust Company, of New York, and Thomas A. Hendricks, of Indiana, their heirs and successors forever, in trust and for the uses and trusts hereby created, all and singular the line of railroad of the said party of the first part, as the same now is or may hereafter be constructed between a connection with the Toledo, Delphos and Burlington Railroad, in the city of Kokomo, Howard county, State of Indiana, and extending thence through the counties of Howard, Clinton, Tippecanoe, Montgomery, Fountain, Parke and Vermillion, in the State of Indiana, and the counties of Vermillion, Edgar, Douglass, Coles, Cumberland, Shelby, Fayette, Bond, Madison and St. Clair, in the State of Illinois, to the city of

East St. Louis, in St. Louis county, Illinois, being about two hundred and seventy miles in length, together with all and singular the right of way, roadbed, made or to be made, its track, laid or to be laid between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine houses, machine shops, buildings, erections, in any way now owned or to be hereafter acquired, or now or hereafter appertaining unto said described line of railroad, between said points, together with all the machinery, supplies, tools and fixtures, now or at any time hereafter held, owned or acquired by the said party of the first part, for use in connection with its line of railroad aforesaid, between said points, and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, now and hereafter owned by the said party of the first part, in connection with its line of railroad aforesaid, between said points, together with all and singular, the powers and franchises thereto belonging, and the tolls, income and revenue to be received or derived therefrom, and conveying no other property.

"Provided, however, and this indenture is upon the express condition, that whenever any of the lands or property belonging to the said party of the first part, and covered by this mortgage, are no longer necessary or convenient for use in connection with said line of railroad, the said party of the first part shall have the right to sell and convey the same on such terms as it pleases, free from the lien of these presents, and on demand the said party of the second part shall release the lien of this mortgage upon all the lands so conveyed, but the proceeds of such sale shall be subject to the liens hereby created.

"To have and to hold the said granted premises unto the said parties of the second part, their heirs and successor or successors forever, in trust, nevertheless, and for the uses and purposes in this indenture expressed, that is to say—"

Assignment of Errors.

The appellant assigns for error—

First, The Court erred in finding and adjudging that appellant's railroad was covered or "described" in the mortgages in suit. Said railroad as matter of fact was not covered by or "described" in said mortgages, nor is there any evidence sustaining that finding.

Second, The Court erred in finding and decreeing that the $1,800,000 par value of stock of appellant so placed in trust might be used for the purpose of effecting a consolidation with The Toledo, Cincinnati & St. Louis Railroad Company, for as matter of fact said contract of March 20, 1883, does not so state or provide.

Third, The Court erred in finding and adjudging that the receiver's certificates issued to the claimants mentioned in schedule B, in the contract of March 20, 1883, had been paid or that the condition in the contract in that respect had been fulfilled and the Construction Company discharged from liability thereon. That as matter of fact many of them have not been paid or discharged, and they are being contested now before this Court, on appeal from the final orders and judgments made in such cases.

Fourth, The Court erred in finding and adjudging that the completion of appellant's railroad was in part performance of the contract of June 9, 1881, or that the Board of Directors of appellant had any knowledge as a board of that contract, or that they acquiesced therein.

Fifth, The Court erred in finding and adjudging that the appellant acquiesced or consented to the agreement between the Western Construction Company and the Toledo, Cincinnati & St. Louis Railroad Company, whereby the bonds of the Toledo, Cincinnati & St. Louis Railroad Company should be issued on the entire line instead of the bonds provided for by the contract of August 31, 1880; or that appellant's railroad should be built out of the proceeds of the Toledo, Cincinnati & St. Louis Railroad Company bonds.

Sixth, The Court erred in finding and adjudging that upon the completion of the appellant's railroad by the Western Construction Company, appellant turned it over to and placed the Toledo, Cincinnati & St. Louis Railroad Company in full possession of it, as its property and as a part of its said line of railroad.

Seventh, The Court erred in finding and adjudging that it was intended by the companies absolutely that a consolidation should be made between the two railroad companies, and that the $1,800,000 should be used and voted for that purpose.

Eighth, The Court erred in finding and adjudging that it was known to the "directors and active promoters" of appellant that the road was being built out of moneys derived from the sale of bonds of the Toledo, Cincinnati & St. Louis Railroad Coompany, instead of moneys derived from the sale of bonds provided for in the contract of August 31, 1880.

Ninth, The Court erred in stating the facts and inferences of fact found by it, and having the same spread upon the record as part of the decree.

Tenth, The Court erred in adjudging that the mortgages in suit, or either of them, were liens in equity upon the appellant's railroad, and in foreclosing them or either of them on appellant's railroad, and ordering its sale on such foreclosure to pay the costs of this suit or said bonds and mortgages, or either of them.

Eleventh, The Court erred in refusing to find and adjudge that the locomotive engine, cars and tools of appellant mentioned in the evidence of James H. Rice were not covered by the mortgages in suit, and in refusing to order the receiver to return them to appellant.

ARGUMENT.

It was the intention of Mr. Ballou and his associates to build a continuous line of railroad from Toledo, Ohio, to St. Louis, Mo. This he explained to the witness *Thomas*. The mortgage in suit in this case and which, it is alleged, affects appellant's rights, was executed July 23, 1881. It rests alone upon the property and franchises of The Toledo, Cincinnati & St. Louis Railroad Company from Kokomo, in the State of Indiana, to East St. Louis, in the State of Illinois. On its face it does not purport to rest upon or affect the property or franchises of the appellant.

It purports to rest upon and affect the property of the first named railroad company only. No allusion is made to the Frankfort & State Line Railroad Company in the mortgages or bonds in suit. Nothing whatever is said about it or its property or franchises. On that subject it is entirely silent.

The bill seeks to fasten a lien on the property and franchises of the Frankfort & State Line Railroad Company on the ground of "acquiescence and consent." This is the sole ground upon which the lien is sought to be fastened upon appellant's property. The bill in terms states that the "first above described" mortgage "creates an equitable lien only, and is not a legal mortgage" on the property and franchises of the appellant. The reasons are then given in the bill why it was thought that an equitable lien existed. They are, in brief, as follows:

1st. Because on the 31st of August, 1880, the Frankfort Company made a construction contract with the Western Construction Company, by which the Frankfort Company was to give the Construction Company first mortgage bonds to the amount of $10,000 per mile and all its shares of capital stock for constructing its railroad.

2d. It was from the first and during all the time of the construction of the appellant's railroad, the intention of the promoters of both enterprises to make the Frankfort railroad a constituent part of the road between Toledo and St. Louis.

3d. The bonds and mortgage provided for between the Frankfort Company and the Construction Company were never made or executed, and the Construction Company never demanded them. On the contrary, with the "aquiescence and consent" of the Frankfort Company, the Construction Company took bonds in like amounts from the Toledo, Cincinnati & St. Louis Company, in lieu of them.

4th. That with the "acquiescence and consent" of the Frankfort Company, the Toledo Company had been in possession of the railroad of appellant since it was finished and had used it as a part of its continuous line, and since a receiver had been appointed for the Toledo Company, he likewise had been in possession and use of it.

5th. That the Construction Company used $1,800,000 par value of appellant's shares of capital stock to secure and "accomplish payment" of sums due to contractors on various parts of the railroad between Kokomo and East St. Louis.

6th. That on the 20th day of March, 1883, a contract was made between appellant, The Toledo Company, and others, whereby the $1,800,000 of stock in appellant's company was pledged by the Construction Company to The Toledo, Cincinnati & St. Louis Railroad Company, and the latter company agreed to pay about $130,000 construction debts owing by the Construction Company to various contractors. Upon the payments of those debts, the stock was to belong to the Toledo Company. On default of payment, it was to be sold, and the proceeds applied to the payment of those debts. The remainder of the $2,000,000 in stock after satisfying local aids was likewise to be turned over in pledge.

7th. The Toledo Company did not pay the debts, but became insolvent and went into the hands of a receiver. That to prevent the stock from being sold, the Judge of the Circuit Court for the

Southern District of Illinois, on petition of the receiver, authorized him to issue receiver's certificates and make them a paramount lien on the railroad and property of The Toledo, Cincinnati & St. Louis Railroad Company, and take the stock out of pledge, and hold it subject to the further order of the court, and for further payment of the debts.

8th. That pursuant to that order the receiver did effect arrangements with the debtors, and did issue receiver's certificates in accordance with the terms of the order, and now holds said stock as such receiver.

Mortgage Not a Lien.

Our contention is, that if all the facts set out in the bill are true (many of which are proven untrue), they do not show an equitable lien under the mortgage on appellant's railroad and property.

Want of Description.

The first essential of a valid mortgage is the description of the thing mortgaged. It has already been pointed out that the mortgage in suit does not purport to rest upon the property of the appellant; as to it and its property the mortgage is silent.

The mortgage in suit only purports to cover the property and franchises of The Toledo, Cincinnati & St. Louis Railroad Company. It had, at the time, a franchise reaching from Kokomo to East St. Louis. It never built a railroad between Frankfort and the State Line at all. It bought a railroad between Kokomo and Frankfort and consolidated it into its general line, but left a gap between Frankfort and the State Line unconstructed. Over this sixty-mile gap it had a charter—a "paper line" only—and this was put into its consolidation, and made a perfect and continuous line on paper from Kokomo to East St. Louis. This is shown by the articles of consolidation, which were introduced in evidence, and are in the record. The bondholders therefore got primarily the exact security they bargained for—no more nor no less. Mr. Ballou said he intended to build up a railroad beneath the mortgage. The bonds were issued and sold while the railroad was being constructed. At the time the mortgage and bonds in suit were executed, the Toledo Company only had twenty miles of railroad west

of Kokomo, and that it had bought subject to a prior mortgage. The charters of the different constituent companies and the consolidations were all on record, and the bondholders therefore knew that the Frankfort & State Line Railroad Company was a separate legal entity, and no part of The Toledo, Cincinnati & St. Louis system. They might have known that it was intended at some future time upon certain conditions to consolidate it into the general system, but they took the risk of such consolidation, and if it did not happen, they had no one to blame but the persons whom they trusted to bring it about. It will hardly be contended that a mere intention can be mortgaged—and yet the appellees are driven to that extremity to maintain the decree in this case.

ACQUIESCENCE AND CONSENT.

It must be borne in mind that there is no question of estoppel in this case; that is not plead or proven. There is no question of mistake. The bill inferentially admits that the property which was intended to be covered by the mortgage was covered. The sole and only theory upon which the bill proceeds is, that it was the intention of the active promoters of both enterprises to consolidate the two railroads at some time in the future. It is admitted that this was never done; but it is insisted that the court should find—and without evidence—and against the evidence—the court did find and set out in

THE DECREE—

1st. That the appellant's railroad was "described" in the "mortgages" in suit. This is without the shadow of testimony supporting it. On the contrary, the mortgage itself shows that appellant's railroad was not covered by, or described in it The witnesses, Thomas, Craig and Rice, all testify why it was not included in the mortgage; and the trust agreement—dated March 20, 1883—recognizes the fact that it was not included in the mortgage. Mr. Thomas testifies what the intention of the promoters was, when the consolidation of the roads should take place. That is, it was intended to have a concurrent resolution passed by the Board of Directors of the appellant, and of the consolidated company acknowledging and recognizing the mortgages already executed;

and this would have made them liens by way of estoppel, as well as under the "after acquired property" clause of the mortgage. But this was never done. It was only an intention which was never carried out.

The decree further recites that it was agreed that the $1,800,000 par value shares of stock of appellant's railroad company should or might be used, to bring about a consolidation of the two railroads. This recital is unsupported by the evidence, except as an inference from what might take place after the Toledo Company had complied with the conditions of the contract of March 20th.

The Toledo Company never did comply with the terms of that contract. It had not paid the contractors' debts, or any part of them, when it became insolvent. The receiver did not pay them or any part of them after he took possession of the railroad. He did, under the direction of the court, issue receivers' certificates, attempting to make them a lien on the Toledo Company's road, paramount to the mortgage. But the bondholders, and those representing the defunct Toledo Company, are now litigating the validity of those very certificates, and the question of their validity is now pending in this Court on appeal.

But aside from this, receivers' certificates are not money, nor are they negotiable paper within the meaning of the law merchant, nor are they made negotiable instruments by any statute. They hold an anomalous position in the commercial world. They float only because of a supposed power in the courts to cause their issue. Sometimes the holders of these certificates find that the power that issued them has not the power to compel payment.

> *Union Trust Co. et al.* v. *Midland Railway Company*, 117 U. S. 434.

So all that is said in the decree about the $1,800,000 stock, and the agreement to use it for consolidation purposes, and all that is said about the payment by the Toledo Company of the debts owing to the contractors, or the payment of them by the receiver, is erroneous and is not supported by any evidence.

Inasmuch as the consolidation of railroads is purely a question of contract, and inasmuch as the Toledo Company and the Frankfort Company never did enter into articles of consolidation, we submit that it is not within the power of the courts to consider railroads

consolidated, and treat them as having been consolidated, when in fact they never did consolidate. Such a power has never yet been assumed by the courts.

How Built.

The evidence does not show that the appellant ever consented to or had knowledge of the contract between the Western Construction Company and The Toledo, Cincinnati & St. Louis Railroad Company, or that the appellant ever consented that its railroad should or might be built out of the proceeds of the sale of the bonds on the main line. Eleven miles of the appellant's road was completed before the date of the construction contract between the Western Construction Company and the Frankfort & State Line Company (vide evidence of W. J. Craig, p. 50). Mr. Thomas says in his evidence that he could not say that all the directors knew where the money came from to build appellant's road, but some of them did. (Rec., p. 73.) Mr. Craig testifies that in addition to the eleven and three-tenths miles already completed, the appellant received $105,000 from local aids and tax, by way of donations for constructing its road. (Rec., p. 50.) Mr. Rice testifies that the right-of-way cost scarcely anything, all of it being donated. (Rec., p. 76.) Therefore this part of the decree is erroneous and can not stand.

That part of the decree which recites that on the completion of appellant's railroad the Western Construction Company turned it over to The Toledo, Cincinnati & St. Louis Railroad Company, as a part of its line of railroad, is equally untrue.

The truth is, that upon its completion, all the interested parties purposely kept it from being consolidated, because, as Mr. Craig says (Rec., p. 48), that a large amount of local aids had been voted, but not collected, and if a consolidation was made the company would lose the donations thus made.

Mr. Rice, Mr. Thomas, and Mr. Craig all agree in their testimony that when the appellant's road was finished it was turned over to the Toledo Company under and by virtue of a contract or lease, found at page 61 of the record. It is immaterial in this controversy whether that contract is a lease or an operating contract merely. But it is material that that agreement distinctly

recognizes the fact that appellant's railroad was not turned over to the Toledo Company as a part of its property. The right of ownership in and to appellant's railroad is emphatically declared by that contract. In its corporate capacity, it contracted with the Toledo Company to allow that company the right to run its cars over appellant's railroad, and to use its property for that purpose. The Toledo Company is estopped, it seems to us, from claiming that it took possession of the appellant's railroad as its own in the face of these stipulations. At least this was the controlling evidence adduced, and the court could not truthfully find and adjudge the facts to be otherwise.

The court found by its decree that it was the absolute intention of the parties concerned to consolidate the two railroads without conditions. This is not true. Not a witness so testifies. All agree that it was intended some time to do so, but there were conditions annexed.

The first condition was that the local tax aid should first be collected. The second condition was that the Toledo Company should pay $134,000 construction debts before it could get the $1,800,000, and use it for any purpose except to keep the corporation alive (vide contract). The third condition was, that consent must be obtained from the stockholders to the terms of consolidation agreed upon (vide Thomas' testimony). A search of the record will disclose that there is not a syllable of testimony showing that either of these conditions has been complied with, except the issue of receiver's certificates by the receiver to the claimants without notice to the Western Construction Company, and the payment of these are still being resisted by the Toledo Company, through its successors. There is no evidence that the aids have been collected or that the stockholders of either company have ever agreed upon a basis of consolidation. In the face of these facts that part of the decree cannot stand.

The Court further found and decreed, without evidence, that the directors and active promoters of the Frankfort & State Line Railroad Company knew that its railroad was being built out of the proceeds of the sale of Toledo Company bonds. The evidence is that *some* of the directors and promoters knew it. How many, or who, is not shown.

Thus far we have discussed the various findings in detail. We have shown that they are erroneous, and do not stand on any truthful foundation. It may be true that the findings, so-called, are not the material part of the decree. But they show the successive steps by which the Court erroneously arrived at the final order and decree of foreclosure. They are the foundation upon which it rests. If they are swept away the decree must fall. Enough has been said in relation to the decree in detail. We now turn to the

Answer.

It is not necessary to lengthen this brief by an extended descussion of the answer in detail. An epitome thereof has already been given and is found on pages 7, 8 and 9 of this brief. In passing, it is proper to say, that the evidence clearly establishes the material allegations of the answer.

The evidence establishes the fact that the Toledo Company took possession of the rolling stock of the appellant. It consisted of one locomotive engine and four construction cars, together with some tools and hand push cars (vide Rec., p. 78). The Court was asked to except this property from the decree, and order its receiver to return it to appellant. This was denied. No one has as yet claimed that this manner of acquiring property is strictly legal. The able counsel have not as yet contended that this property was "intended to be consolidated," and was therefore swept into the mortgage by way of equity.

It is not perceived why this property should not have been restored to its owner by a court of equity whose receiver was in possession of it, without claim of right, or why it should be sold under a decree of foreclosure of a mortgage which does not describe it, and which, it was never intended by any one, should be mortgaged.

When the findings of the court are corrected by eliminating the errors pointed out, there remains nothing upon which to base the decree of foreclosure, except the unexecuted intention of some of the promoters of both railroads, at some future time, and upon the happening of certain things, to consolidate the said railroads into one corporation.

MORTGAGES OF LAND MUST BE IN WRITING.

Parol proof to show the intention of the parties at the time of the execution of a mortgage is inadmissible. The mortgage must speak for itself.

Montgomery v. *Chase*, 30 Minn. 132.

An agreement to execute a mortgage on certain specified property, supported by a sufficient consideration, will in equity sometimes be treated as a mortgage; but the agreement must be in writing.

Payne v. *Wilson*, 74 N. Y. 348.

There is no pretence in the present case that there was any agreement in writing between the two railroad corporations, whereby the appellant agreed to mortgage its property to secure the bonds of the Toledo, Cincinnati & St. Louis Railroad Company; and the only agreemen tin writing in relation to a consolidation, is a recital in the March 20 contract, wherein it is said that the Western Construction Company had agreed to sell and assign its shares of stock in appellant's railroad to the Delphos Trust, for the sole purpose of effecting a consolidation of the two roads. But the consolidated company would not be liable for the debts of a constituent part unless it was so agreed between the two companies at the time of the consolidation. No authority from the Board of Directors to the President of the Frankfort Company authorizing him to make such a recital is shown. In fact, there was none.

Wright v. *Bundy*, 11 Ind. 400.

The law of Indiana authorizing the consolidation of two railroads within the State, is as follows:

Section 3971 (R. S. 1881). Any railroad company heretofore organized under the general or special laws of this State shall have the power to intersect, join, and unite its railroad with any other railroad constructed, or in progress of construction, in this State, or in any adjoining State at such point on the State line or at any other point as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of

the adjoining State, with whose road or roads connections are thus formed. *Provided,* Their charters authorize said railroads to go to the State line or to such point of intersection.

Section 3975 of the same Code extends the same rights to railroad companies thereafter organized.

It therefore appears, that terms of consolidation are subjects of mutual agreement. No terms of agreement, in reference to a consolidation are set out in the bill, or proven in evidence. The only proof on the subject is the evidence of Mr. Thomas (Rec., p. 70). He states that Mr. Ballou explained to him, that it was the intention to get a line as quick as he could, mortgage it, and build up a railroad beneath the mortgage. That this scheme was carried out: each constituent railroad, as it was consolidated, by the terms of consolidation, ratified the mortgage in suit "except the Frankfort & State Line Road, which was never consolidated."

We submit, this case is not ripe for the application of the rule that equity will consider that done which ought to have been done. Here there is no contract, written or verbal, whereby the appellant agreed to mortgage its road or property to secure the debt of the Toledo, Cincinnati & St. Louis Company. Neither is there any contract of consolidation between the two companies, in which the terms of such consolidation are given. In order therefore for the Court to apply the equitable rule, it will be compelled first to make a contract between the two companies, and then consider that the contract thus made ought to have been made Uniformly the courts refuse to take this step. It is only where contracts are complete in all essentials, though informal or defective in unsubstantial matters, that equity intervenes and applies the rule above stated.

See *Story's Eq.* (12th Ed.) S. 64, g.
Craig v. *Leslie*, 3 Wheat, 563.

Not a Purchase-Money Lien.

It was falsely claimed that the appellant's railroad was entirely built out of the money raised by the sale of the Toledo Company's bonds, and for this reason an equitable lien existed in favor of the bondholders.

To this we answer, if it were so, it does not follow that the mortgage in suit is thereby an equitable lien on appellant's property.

If A loans to B $5,000, and takes as security a mortgage, and B puts that $5,000 into a house belonging to C, it does not follow that A has an equitable lien on C's house by virtue of his mortgage because the money he loaned B went into it. That would be carrying the doctrine of equitable liens, to a length never before heard of.

For the purposes of this argument we may admit that the Toledo Company may maintain an action against the Frankfort Company for money loaned it, to build its road, but it does not follow that the Toledo Company has a specific lien on the railroad by reason of the debt.

There is no analogy between the lien claimed in this suit, and a vendor's lien on real estate for purchase money. Viewed in any light, it was but a loan of money by the Toledo Company to the Frankfort Company, for which an action would lie for money had and received.

Unexecuted Intention.

We admit that it was the intention of some of the promoters of the two railroads to consolidate them at some future time. But this intention was never effectuated. No terms of consolidation were ever agreed upon. No agreement as to liabilities, assumed, or to be assumed, was ever made. No agreement in writing or otherwise was ever made between the two companies that the Frankfort Company should mortgage its railroad and property either to the Toledo Company or any one else to secure the bonds of the latter named company. The whole thing rested in a vague and undefined intention; and there it must continue to rest so far as this proceeding is concerned; for there is no power in this court or any other to enforce by judicial decree a supposed lien arising in this manner.

Bank v. *Adams*, 109 U. S. 211.

Pomeroy Eq. J., vol. 3, s. 1191, n.

The Toledo Delphos and Burlington Railroad.

Much stress, undoubtedly, will be put upon that provision of the contract between the Frankfort Company and the Construction Company, dated August 31, 1880, to the effect that the road, when completed, was to be made a part of the Toledo, Delphos & Burlington Railroad. It will be contended that this provision controls the parties in interest, and that all parties concerned were bound to carry out this provision and consolidate the two railroads. It is a sufficient answer to this to say that the contract was changed in this particular by the contract of March 20, 1883, whereby the Toledo Company, into which the Delphos Company had been merged, agreed to the terms of the latter contract. The Toledo Company was satisfied to obtain control of the Frankfort Company by paying, or agreeing to pay, $130,000 construction debts, and thereby acquiring the control of a large majority of the stock of the Frankfort Company. Until it did pay these debts, the stock was to be used but for one purpose, viz., to keep up the organization of the company (vide contract). After it paid these debts, it was to hold this stock as security for the money paid, and presumably until an accounting was had between it and the Construction Company. At least the contract is silent as to the absolute ownership of the stock, and as the Western Construction Company was not made a party to this suit, it is immaterial to inquire further concerning that question. It is enough to know that the question of consolidation was waived in this contract and the control of the road was to be had through the stock. This is the fair interpretation of the contract and is fully supported by Mr. Craig's testimony. (Rec, p. 51.) Besides this it will be noticed by reading the contract that nothing is said about consolidation. It was only to form a part of the line. This could be done, as it was done, by an operating contract or lease.

Lastly.

It seems to us that a precisely parallel case to the one in hand may be put as follows:

A is the owner of two parcels of land fronting on Pennsylvania avenue. B is the owner of a parcel of land adjoining and between the two owned by A. A proposes to erect a hotel building on his